No. 21207

United States Court of Appeals For The Ninth Circuit

LARRY P. SMITH, ET AL.,

Appellants,

vs.

HILLTOP REALTY, INC., ET AL.,

Appellees,

HILLTOP REALTY, INC., ET AL.,

Cross-Appellants,

vs.

LARRY P. SMITH, ET AL.,

Cross-Appellees,

and

THE AUSTIN COMPANY,

Additional Cross-Appellee as to Count No. 4 only.

On Appeal from the Judgment of the United States District Court for the Western District of Washington

APPENDIX TO OPENING BRIEF OF LARRY P. SMITH, ET AL., AS APPELLANTS

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APPENDIX TO APPELLANTS' OPENING BRIEF

TABLE OF CONTENTS

I. WRITTEN MEMORANDUM DECISIONS AND EXCERPTS FROM COURT'S ORAL REMARKS

A. Tentative Oral Opinions of August 6, 1965 (Tr. 2565-2573, 2576-2579):

THE COURT: The Court indicated to you yesterday that he would at this time make known to both parties his tentative thoughts in connection with the factual and legal issues presented in this case. In so doing the Court wants both parties to know that, with one exception, that I will mention later, the thoughts expressed today are tentative only, merely my impressions at this time, and not final in any respect. In other words, the Court poses the challenge to each of you of convincing me to the contrary.

This is the first time that I have done this. I don't know that it is a wise procedure, but I thought that in view of all of the evidence that has gone into this case thus far, it would be well to make my tentative impressions and thoughts known and let you concentrate on those in your briefs.

This case has been very well prepared by counsel on both sides. Both are to be commended for this. As a matter of fact, this is one of the most thorough and best-investigated cases that has come before me. This being so, there is a mass of exhibits as well as a great volume of testimony. The Court has not had the opportunity of examining all of the exhibits thoroughly or of weighing all the evidence carefully. It may very well be that he has overlooked or failed to give proper emphasis or failed to draw appropriate inferences from the evidence in giving you my tentative thoughts or impressions at this time. But as I say, I am putting the burden on each of you to establish to the contrary any thoughts that I express which are unfavorable at the present moment.

Now I think I will first discuss the cause of action predicated on fraud.

The relationship between Hilltop and Smith, that is, the nature of the service to be performed by Smith in its contractual undertaking with Hilltop, was such that it required a full disclosure by Smith to Hilltop of Smith's every interest in Severance. Nothing less would do.

Hilltop knew that Smith had performed services in connection with Severance. In fact, as I recall, the excellence of their performance at Severance was the motivating factor in the employment of Smith. Treiger and the others with whom he discussed or communicated about the situation may very well have thought that in originally revealing to plaintiffs that which Treiger did about Smith's relationship with Severance, Smith was making a sufficient disclosure of the conflict of interest which Smith knew to exist, but in this he was wrong. Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein, or to refuse the job.

I am satisfied that this concealment was originally and throughout the entire relationship between Smith and plaintiffs calculated, deliberate and intentional, as distinguished from inadvertent, accidental or misunderstanding. The Court is of the very definite opinion that the concealment in law amounted to constructive fraud. This is the exception to which I referred earlier.

The Court questions, however, that the concealment was prompted by any desire on the part of Smith to seek pecuniary gain at the expense of plaintiffs, or to cheat or defraud them in any way. I am for the present inclined to the view that the concealment was for the purpose of respecting the confidence of Austin. Such an intent, however, does not justify the concealment or

excuse what the law deems to be fraud. Furthermore, it is not to the credit of Smith that they took affirmative action to further conceal the true relationship with respect to Severance after plaintiffs became suspicious and asked for an explanation. Smith at all times proceeded on the theory that they had a choice between revealing all or only a part of their true relationship with Austin respecting Severance, but in law they had no choice. Smith's only alternative if it desired to respect the confidence of Austin was to decline the undertaking. The only choice which existed was that of plaintiffs to accept or reject Smith's employment after being fully informed of all of the facts.

Now, other than as stated, the Court expresses no views with respect to the contention of actual fraud at this time, although I think it only fair to state that I of the present belief that both Petti and O'Neill relied upon the report of Smith and upon the presentations made in connection with that report, and I am also of the present view that the Winslow sisters in turn relied upon the report by acting upon the recommendations of O'Neill, which were based upon the report.

Now a word about the cause of action based on contract. First of all, it is my present view that the Winslow sisters are not third party beneficiaries as that term is known in law, and hence, that they are not entitled to maintain an action on the contract between Hilltop and Smith.

The Court is of the view that in submitting the report to Petti, Exhibit 29, I mean, there was a contractual obligation on the part of Smith to reveal in the report the full nature of their interest in Severance, and the failure to do so was a breach of the contract. I may be wrong, but that is my present view. In other respects in which it is contended that the contract was

breached, the Court is presently of an open mind. That is, I have no thoughts one way or the other.

Next, I would like to say a few words about the defense of the statute of limitations which is contended by Smith as to the additional or added defendants made parties in the amended complaint lodged with this Court on July 20, 1964. The Court previously held in a memorandum decision dated March 29, 1965 that I could not hold as a matter of law that the cause of action as to the additional defendants was time-barred, and such holding had the effect of postponing the decision on this question until the time of trial.

The critical questions posed are whether the plaintiffs exercised due diligence for the period commencing on or about February 16, 1961, following the meeting in Cleveland with Treiger, and the critical date of on or about July 21, 1961 — I am not sure of these dates, gentlemen, I have not taken the trouble to look them up definitely — and also whether certain of the defendants are estopped to assert the statute of limitations.

I think I am prepared to find that the plaintiffs at the meeting in Cleveland on February 16, 1961, I think that is the correct date, were lulled into a position of false security by the representations made by Treiger at that meeting. As the Court recalls, there is no evidence of what the plaintiffs did in this respect during the approximate five-month period following the meeting, or at any time thereafter up until the original action was filed. Some time between February 15, 1961 and January 4, 1963, when the original complaint was filed, the plaintiffs apparently became suspicious or sufficiently dissatisfied with the representations made by Treiger that they consulted counsel, which resulted in the original filing of this action. But insofar as I recall, there is no evidence of when such occurred.

I therefore pose this question: May I on the evidence now before me conclude that the plaintiffs were justified in waiting until after approximately July 20, 1961 before instituting action against the added defendants?

On the other phase of this question, it was brought to the Court's attention at the time the dismissal as to the additional defendants based upon the statute of limitations was presented that some of the defendants, Eberhart, Kelly and Steichen, I believe, had failed to comply with the assumed business name law in the State of Washington, that plaintiffs had no knowledge of their interest in the partnership, and that because of such failure the plaintiffs were prejudiced. At this moment I do not recall the exact dates that these three partners became such, but assuming arguendo plaintiffs' contentions to be proved, the Court does not recall any evidence presented during the trial of this case from which it can find prejudice. Accordingly, unless there is such evidence, and I ask plaintiffs' counsel to call it to my attention in their brief, I must hold that the three mentioned defendants are not estopped to assert the statute of limitations.

The Court now comes to what he considers the critical question in this case, namely, damages, both of a compensatory and of a punitive or exemplary nature.

Both sides have produced reputable and outstanding experts both in the field of economic analysis of regional shopping center developments and on the subject of value. I have given a lot of thought to this subject, but I have not yet examined all of the evidence critically with respect thereto. I must say, however, that at this moment I am not convinced that Nutwood Farms had a potential as a regional shopping center, or put in another way, that its highest and best use was for such a purpose, or that it had the value which plaintiffs contend.

In other words, Counsel, what I am trying to say is that I entertain doubt that the property had any greater value than the price obtained from the Harry Ratner interests, I believe they were, Ridge Hills Development Company, I believe it was called. Plaintiffs' counsel may be able to convince me to the contrary, but assuming they do not, I take this opportunity of posing a further problem: I think there is little doubt but that Hilltop has been damaged in the amount that it paid Smith, approximately $2,900.00, I believe, for a report which was in law worthless because of the concealment. Should Hilltop be awarded such damages and in addition thereto, punitive damages? That is the question I pose. Also in the absence of a finding of actual damage as to the Winslow sisters may the Court award nominal damages, and if so, may I and should I award punitive damages in addition? Also, should punitive damages, if awarded, include reasonable attorneys' fee for all or part of the work done by plaintiffs' counsel?

In the event the Court should allow punitive damages, a further and additional problem is presented: Against whom should the judgment run?

I do not recall evidence that any partner authorized the concealment or the misrepresentations with respect to Smith's true interest in Severance, but I am confident that there is evidence from which the Court could find that the acts and omissions of Treiger were ratified by one or more of the partners, and I ask plaintiffs' counsel to call such evidence to the Court's attention in the briefs to be presented.

* * *

Mr. Stephan: Yes, your Honor, all right. There is only one problem, it is a legal problem, we think most of it is factual that we can marshal. There was filed with the Court, but I don't know whether it has come

to the Court's attention yet, a brief, and we haven't seen any answer to it, which we thought very clearly established under Ohio law that under the facts here the Winslow sisters were clearly third party beneficiaries.

THE COURT: I saw that, and I don't think I agree with you.

MR. STEPHAN: All right.

MR. WHITE: We have a brief on that, your Honor, but until we heard your remarks we didn't know whether to file it. There is at least one additional case in Ohio which, at least under our interpretation, makes it very clear that they are not.

MR. STEPHAN: It would be very helpful to have your brief.

THE COURT: Ohio law is not very much different from the Washington law or the general rule. I will concede that they were an incidental beneficiary, but I don't believe they reached the status of being third party beneficiaries.

No, as I view this, except with respect to some of the phases of exemplary damages I think this is pretty largely factual and that the third party beneficiary is a legal question, but I suggest that you not spend too much time on that because my mind is pretty well resolved on that phase of it, right or wrong.

On the statute of limitations, there is no legal question, it is factual and what there is in the testimony that is before me in the case.

MR. WHITE: As I indicated earlier, your Honor, one of the serious legal questions, at least in our minds, and I have discussed this to some extent with Mr. Stephan and given him citations, is the matter of the Ninth Cir-

cuit rule that an expert witness as to value may not consider events occurring after the —

THE COURT: I am quite well aware of the rule on which you rely, and you may very well be right, but what I want you to do is to point out in your brief those portions which you think violate the rule.

MR. WHITE: I will do that.

THE COURT: I was conveying, however, to you my impressions with the testimony concluded, my present impressions, but maybe you can convince me to the contrary. I thought it would be well for you to know where to put your emphasis.

MR. STEPHAN: Oh, it is very helpful, your Honor, it is very helpful. We will work on it at once.

THE COURT: I may have vacillated from time to time with respect to Mr. Petti's reliance, but after considering it fully I am of the present view that he relied, although you may convince me that I am wrong.

MR. WHITE: We are sure going to try, anyway.

THE COURT: A good real estate man never gives up. I am satisfied in my own mind from the immediate actions following the report that he did, but you may convince me to the contrary.

MR. STEPHAN: We realize the great mass of economic data and we are going to address ourselves primarily to the factual issue of the desirability of the property for a regional shopping center as we understand it.

THE COURT: And now another thing I didn't mention where you might in connection with actual fraud concentrate, try to point out to me from the evidence a motive on the part of Smith, where they stood to gain or profit. It would be easy, of course, if they themselves had bought the property or arranged with someone in

their own organization to purchase the property, but it is hard for me at this moment to see a motive of pecuniary gain.

MR. STEPHAN: We believe, your Honor, from the evidence that we can very clearly establish that.

THE COURT: Or as to constructive fraud, if it was something that naturally flowed from the other whether they had the motive or not, is another factor. But I have given you as far as my tentative thinking has gone.

B. Written Memorandum Decision of October 27, 1965 (Tr. 2770-2777):

At the time this matter was submitted to the Court for decision it was agreed that the question of oral argument would be deferred until after the Court had read the posttrial briefs. It was also agreed between counsel at an early stage in the proceedings, which agreement was acquiesced in by the Court, that if the Court deemed it helpful to a decision in this case the Court would visit Cleveland for the purpose of viewing the area in dispute. Inasmuch as counsel have been so diligent, competent and thorough in the presentation of testimony and in the preparation of posttrial briefs, the Court does not believe that oral argument or a view of the premises would be of material assistance in the decision of the case. Accordingly, the time has come when the Court must render a decision in this long and hard fought case. Whether this decision will constitute a terminus or merely a milestone in this lengthy litigation the Court can only speculate. Suffice it to say that the Court recognizes and appreciates the diligent efforts which counsel have thus far expended on behalf of their respective clients and in clarifying the issues for the Court. The case has been well tried and counsel

have given their clients the benefit of every reasonable argument and shred of evidence.

The Court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error, but *the plaintiffs relied on the conclusions of the report* and not on the details of the analysis *in making their decision to sell the property to Ridge Hills.* However, assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the Court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. The Court does not accept the opinions of the land value experts on either side of the controversy, and inasmuch as plaintiffs have failed to sustain their burden of proof the issue must be resolved in favor of the defendants. Defendants' principal expert based his conclusion upon what the Court believes to be an erroneous premise and the opinion of plaintiffs' expert is predicated somewhat on hindsight, information not available at the time of, or prior to, the sale of Nutwood, and comparable sales which the Court cannot accept as probative of the value of Nutwood. It therefore becomes unnecessary for the Court to pass on defendants' posttrial motions to strike the testimony of Mr. Fenton and Mrs. Tyler.

Spec. 1

The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice.

The cause of action for the fraudulent concealment of Larry Smith & Company's proprietary interest in the Severance Center arose when the market analysis report on Nutwood was delivered to the plaintiffs in January of 1960. At this point in time the defendants Imus, Orndahl, Kelly, Eberhart and Steichen were neither partners in Larry Smith & Company nor residents of the State of Washington, and were served with process outside of the State under the Washington "long arm" statute, RCW 4.28.185, and F.R.Civ. P. 4(e). However, it appears that the only possible basis of service under the long arm statute is if the fraud arose out of the transaction of business within the State. Since the fraud occurred before these defendants became partners, there appears to be no way in which their alleged participation in the fraud could have arisen out of their transaction of business within the State of Washington. Accordingly, the service of process upon them was ineffectual and the fraud cause of action will be dismissed as to them without prejudice.

The Court finds that the remaining defendants are liable for actual fraud committed by Larry Smith & Company in concealing from Hilltop the fact that Smith was then conducting negotiations to acquire an interest in the Severance property. Such concealment was material to plaintiffs' course of conduct and caused plaintiffs to falsely believe that Smith was no more than a consultant on the Severance development, which belief was knowingly and intentionally fostered by Larry Smith & Company. Hilltop relied on such belief in selecting Smith to produce a market analysis and all plaintiffs relied thereon in determining their course of conduct after the negative report

Spec. 1

was received. By the very nature of the relationship between the parties, the plaintiffs had a right to rely on an absence of such a conflict of interest on the part of one from whom expert advice was sought. Inasmuch as the concealment of the conflict of interest made the Nutwood report totally untrustworthy, the plaintiffs also suffered financial injury as a proximate consequence of the concealment. Plaintiff Hilltop was damaged in the amount of the price it paid for the market analysis and the plaintiff sisters were knowingly deprived of the benefit of their contract with Hilltop whereby Hilltop obligated itself to procure the analysis for their benefit. Although the Court cannot from the evidence ascertain what value a reliable market analysis had to the sisters, it does find that it did have some definite value. *Thus, the Court concludes that all eight elements of fraud under Ohio law have been proven by clear, cogent and convincing evidence. Plaintiff Hilltop is entitled to recover the amount it paid for the market analysis and the plaintiff sisters are entitled to a recovery of $100.00 as nominal damages.*

Spec. 4

Spec. 1

Spec. 2 and 3

The Court has carefully reviewed the Ohio authorities and has *concluded that this case is an appropriate one for the award of punitive damages. The decisions of the Ohio courts clearly demonstrate that punitive damages are recoverable in a case such as this where "the defendant's conduct shows a wanton or reckless disregard of the legal rights of others . . ." Saberton v. Greenwald,* 66 N.E.2d 224, 229 (Ohio 1946), quoting from 13

Spec. 5(b)

Spec. 7

Ohio Jur. § 137; *Sears v. Holly*, 178 N.E.2d 91 (Ohio Ct. App. 1960); see *Waters v. Novak*, 115 N.E.2d 420 (Ohio Ct. App. 1953). *The Court has also concluded that the case of Schumacher v. Seifert, 172 N.E. 420 (Ohio Ct. App. 1930), authorizes an award of punitive damages where, as here, actual though nominal damage is found.* } Spec. 6

The Court further finds that the fraudulent concealment by Treiger of Smith's prospective proprietary interest in Severance was authorized by the defendant Orndahl, then the manager of the New York office, and by defendant Imus, then the manager of Smith's Eastern Division, and that such acts of authorization were within the scope of their respective employments by Larry Smith & Company. CF. *M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ohio Ct. App. 1929). Furthermore, *the concealment was* not only calculated, deliberate, and intentional, it was *done pursuant to company policy,* as defendants so clearly demonstrate in their posttrial brief (Sec. XIII, pp. 99 *et seq.*). *The company's method of doing business, of keeping the partners in its far-flung organization informed, and its system of reading files make the inference inescapable that one or more of the partners was aware of the concealment and at least acquiesced therein. Furthermore, Treiger's attempts to justify and minimize the concealment at the meeting with Petti and O'Neill on August 10, 1960, in response to a written inquiry from Petti must have come to the attention of, or may even have been authorized by, one or more of the partners. Any one of these factors standing alone would be sufficient basis for the Court's find-* } Spec. 11 and 12

ing that the fraudulent concealment is chargeable to the partnership, and the partners who were originally made defendants are jointly and severally liable for actual and punitive damages. RCW 25.04.130, .150(1).

All that remains is to fix the amount of punitive damages and this is a subject to which the Court has given a great deal of thought. *Larry Smith & Company willfully concealed the conflict of interest and when the plaintiffs became suspicious of the conflict their investigations logically turned to the substance of the Smith market analysis and substantiating report. The mistakes, errors and examples of unprofessional workmanship which they therein found and subsequently continued to find, together with the concealed conflict of interest and other suspicious circumstances which they discovered, fully justified the prosecution of this legal action. Although the plaintiffs have been unable to prove all of their suspicions, they have proved to the Court's satisfaction that their expenses in this lawsuit are a result of the defendants' fraud. The Court, therefore, proposes to fix punitive damages, and he has in mind, as a minimum, such amount as will reimburse plaintiffs' expenses in the prosecution of this action and also the possible award of an attorney fee as is authorized by the law of Ohio. Davis v. Tunison,* 155 N.E.2d 904 (Ohio 1959).

Spec. 9 and 10

The Court desires to confer with counsel preparatory to a further hearing on the exemplary damage issue

and such conference is set for November 8, 1965 at 11:00 a.m.

DATED this 27 day of October, 1965.

(s) W. T. BEEKS
United States District Judge

C. Court's Remarks at Oral Argument on April 22, 1966 (R. 2134-2135):

THE COURT: . . . I did find that and I stand by that. I think it is a deliberate, wanton concealment in complete disregard of the rights of the plaintiffs in order to serve Smith's own ends in what they conceived to be their understanding and their duty with The Austin Company, but at the same time I am sure that they did not do it for direct financial profit in connection with the Severance project. They did it in connection with Austin Company's good will, there is no question about that, to retain that.

MR. STEPHAN: We briefed that phase, your Honor, and I won't labor our view.

THE COURT: Well, that has been my feeling all along on that particular phase of it. But it was deliberate and intentional, there is no doubt about it.

D. Final Written Memorandum Decision of May 2, 1966 (Tr. 2777-2791):

Defendants have sua sponte filed a brief raising issues of law relative to punitive damages which the Court thought had been decided and laid to rest long ago. However, because of additional authorities cited therein the Court permitted defendants' counsel to argue these issues orally at the hearing which was originally set for argument solely of factual issues re punitive damages. As a result of defendants' argu-

ments, the Court has undertaken a complete review of the applicable law, the evidence and its prior decisions.

As a result of such review the Court has decided to amend its prior decision in one particular. Defendants contend that the terms "actual damages" and "nominal damages," as used by the Ohio courts, are mutually exclusive and that nominal damages will not under Ohio law support an award of punitive damages. In the memorandum decision of October 27, 1965, the Court found that the sisters had been knowingly deprived by the defendants of the benefit of the contract which the sisters made with Hilltop, by which Hilltop obligated itself to procure a market analysis of Nutwood for the sisters' benefit. The Court found that a reliable market analysis did have a definite but undeterminable pecuniary value to the sisters and the Court therefore awarded them $100.00 "as nominal damages." By this the Court meant, as is clear from the context, compensatory damages, though nominal in amount. On review of the evidence in the case, however, *the Court has concluded that there is sufficient evidence in the record to support a finding that the fair market value to the sisters of a reliable and trustworthy Nutwood market analysis was at least equal to the price which Larry Smith & Co. billed Hilltop for their analysis, or $2,920.00.* The memorandum decision of October 27, 1965, is herewith amended accordingly.

Spec. 2 and 3

Defendants have asserted that under the contract between Hilltop and the sisters, Hilltop had no obligation to provide a market analysis. Defendants contend that the contract was in effect the grant of an option to Hilltop for an exclusive listing of Nutwood predicated upon Hilltop accomplishing two of five enumerated objectives, one of which was the procurement of a market

analysis of the Nutwood property. Although the defendants may be correct as to the nature of the contract, *when Hilltop exercised the option by undertaking to provide a market analysis of the Nutwood property it became obligated to provide a* reliable and trustworthy *market analysis. Hilltop did in fact provide a market analysis, which was rendered totally unreliable and highly suspect by the subsequent discovery of Smith's tortiously concealed pre-existing conflict of interest. This, together with errors in the Smith market analysis, the delivery of a "substantiating report" which also was not free from error, the competitive positions of Nutwood and Severance and other suspicious circumstances, fully justified the prosecution of the fraud and breach of contract counts of this suit. The Court also believes that the antitrust counts were justified up to a point which the Court need not determine.* Thus, Smith fully performed its contract, in spite of what later proved to be inconsequential errors in its report. However, *Smith not only rendered its own product, the very object of the contract, totally worthless by its fraud, it also deliberately withheld information, the disclosure of which in all probability would have rendered this expensive lawsuit unnecessary. In the Court's view these facts amply justify an award of punitive damages in an amount sufficient to compensate plaintiffs for the expenses of this lawsuit,* if the law of Ohio permits the imposition of such damages.

Spec. 4

Spec. 9 and 10

Spec. 9 and 10

The argument of the defendants is that Ohio law requires a showing of actual malice, *i.e.,* "ill will or

hatred," before punitive damages may be awarded. The Court has expressly found that the defendants' conduct was not so motivated. Defendants rely on the five[1] most recent punitive damage decisions of the Ohio Supreme Court as demonstrating a transformation in the relevant law which has not been explicitly expressed by the Ohio Court, but which nevertheless overrules sub silentio the Ohio opinions relied upon by this Court in its prior memorandum decision for its holding that it was enough to award punitive damages under Ohio law that plaintiffs have shown that defendants willfully and deliberately committed a fraud on the plaintiffs in wanton disregard of plaintiffs' rights.

The Court based its conclusion on two Ohio cases, *Saberton v. Greenwald,* 66 N.E.2d 224 (1946) and *Sears v. Holly,* 170 N.E.2d 91 (Ohio Ct. App. 1960).

In *Saberton v. Greenwald, supra,* the defendant jeweler sold plaintiff a wristwatch, representing it as a new watch, when in fact it was a twenty- to twenty-five-year-old watchworks in a new case. The watch cost about $20.00 new, but was sold to plaintiff for $38.15. Defendant had refused to rescind the transaction when plaintiff discovered the true age of the watch. The trial court had refused to instruct on the issue of punitive damages. The Court of Appeals affirmed, but the Supreme Court reversed, holding that the case was a proper one for the award of punitive damages, since it was an action for "a tort which involves the ingredients of *fraud,* malice *or* insult." 66 N.E.2d 224 (Syllabus No. 2) (emphasis added). The Court also quoted with approval from 13 Ohio Jur. § 139 a statement that Ohio law permits recovery of punitive damages if "the

[1] *Saberton v. Greenwald,* 66 N.E.2d 224 (1946); *Smithhisler v. Dutter,* 105 N.E.2d 868 (1952); *Davis v. Tunison,* 155 N.E.2d 904 (1959); *Rogers v. Barbara,* 164 N.E.2d 162 (1960); *Pickle v. Swinehart,* 166 N.E.2d 227 (1960).

wrong complained of involves ingredients of *fraud,* malice, *or* insult, *or a wanton and reckless disregard of plaintiffs' rights.*" 66 N.E.2d at 230 (emphasis added). Certainly from the facts in the *Saberton* case it cannot be said that the defendant's fraudulent conduct was motivated by "ill will or hatred" toward the plaintiff.

Defendant, however, contends that the case of *Smithhisler v. Dutter,* 105 N.E.2d 868 (1952), marked the beginning of a judicial transformation of Ohio law on the question of punitive damages. Indeed, the syllabus by the court does state, "In tort actions, the question of punitive damages may not ordinarily be submitted to a jury in the absence of actual malice." 105 N.E.2d at 868. However, this was an action for alienation of affection. Obviously punitive damages could not in such an action be based on fraud and the only question on appeal was whether implied malice would justify an award of punitive damages. The court affirmed the two lower courts, holding that implied malice was sufficient. This Court is of the opinion that the proper construction of this holding is that for public policy reasons, *in an action for alienation of affections,* implied malice is sufficient, although in other tort actions actual malice would ordinarily be required, *if malice* (not fraud or insult) is the basis on which punitive damages are sought. This is the only construction which is consistent with the Ohio Court's quotation of the second syllabus of *Saberton* and its statement, "The rule in Ohio seems to be that ordinarily, in tort actions, punitive damages are allowable in cases in which *fraud,* malice *or* insult appears. . . ." 105 N.E.2d at 871 (emphasis added). Thus, the *Smithhisler* case represents an exception to the ordinary rule.

The next case cited by defendants which supposedly illustrates the "judicial trend" toward requiring "ill will or hatred" is *Davis v. Tunison,* 155 N.E.2d 904

(1959). The *Tunison* case was an action for malicious prosecution by the payee of a check, who had been charged by defendant with using the check to obtain money by means of false pretenses and with intent to defraud. Plaintiff had refused to honor the check on the ground that the plaintiff's signature had been forged thereon. Defendant filed the charges after being advised by a handwriting expert that the signature on the check was in fact that of the plaintiff. Although a justice of the peace bound the plaintiff over to the grand jury, the grand jury returned a "no bill." Defendants rely on Syllabus No. 1 by the Ohio Supreme Court, "In an action for malicious prosecution, actual malice must be shown in order to justify an award of punitive damages." This, they contend, requires a showing of actual malice in every case where punitive damages are sought. This Court, however, holds, for reasons which follow, that the *Tunison* rule is restricted to actions for malicious prosecution. First of all, as in *Smithhisler,* fraud was not claimed as a basis for an award of punitive damages. Secondly, Syllabus No. 2 by the Court would allow punitive damages even in malicious prosecution actions if the prosecution is instigated "Wantonly, recklessly, and without justification." Thirdly, the Court stated at 155 N.E.2d 906, 907:

> "(I)n order to justify a jury in awarding punitive damages within its discretion, there must be the ingredient of *fraud,* malice *or* insult . . .
>
> "We are of the opinion that, before the question of punitive damages may be submitted to a jury, the *fraud,* malice, *or* insult connected with the tort must be actual and not imaginative." (Emphasis added).

Finally, after noting that implied malice was found to be sufficient in the *Smithhisler* case, the Court went on to find that actual malice, not implied malice, was required in an action for malicious prosecution. "Other-

wise, there would be too great an inhibition upon the part of people to originate a prosecution for crime, and, in many cases, justice would be defeated because of a fear of the risk in exposing a crime." 155 N.E.2d at 907. Thus the effect of the *Tunison* case is merely a refusal by the Ohio Supreme Court for reasons of public policy to extend the exception made in *Smithhisler* to actions for malicious prosecution. The *Tunison* case clearly leaves the normal rule unaltered, *i.e.,* that punitive damages may be based on "fraud, malice or insult." Any confusion arising from *Tunison* results from the fact that, as in *Smithhisler,* by the very nature of the cause of action asserted, malice was the sole basis upon which punitive damages could be predicated and hence the Court framed its syllabi solely in terms of malice.

The other two cases cited by defendants as part of the supposed "trend" are *Rogers v. Barbara,* 164 N.E.2d 162 (1960), and *Pickle v. Swinehart,* 166 N.E.2d 227 (1960). Both were actions for malicious prosecution and, notwithstanding defendants' contentions, the Court believes they basically do no more than repeat the rule of the *Tunison* case. It is true that *Rogers* overruled *Tunison* to the extent that *Tunison* would have allowed punitive damages, *in an action for malicious prosecution,* for a prosecution instigated "wantonly, recklessly, and without justification." The reason given is that the very elements of an action for malicious prosecution require more than wantonness or recklessness. As the Court stated, quoting from 22 Am. Jur., *False Imprisonment,* §§ 2, 3, "In the case of malicious prosecution . . . *the gist of the cause of action is malice or evil intent*" (emphasis by the Court). In essence, the Court was saying that if the gist of a cause of action is "malice or evil intent," how can the standard for awarding punitive damages in such an action be anything less?

Pickle v. Swinehart, supra, merely held that "legal malice" is not synonymous with "actual malice" and is insufficient for an award of punitive damages *in an action for malicious prosecution.*

In spite of the diligent efforts of defendants' counsel in expounding the law of Ohio, the fact remains that the *Saberton* case is the most recent decision of the Ohio Supreme Court construing the Ohio law of punitive damages where fraud is claimed as the basis for such damages. It has never been disapproved or overruled. *Saberton clearly allows punitive damages in such a case without a showing of "ill will or hatred."*[2] } Spec. 7

Furthermore, there is the intermediate appellate court decision of *Sears v. Holly,* 178 N.E.2d 91 (Ohio Ct. App. 1960), which was decided after all of the above cases relied upon by defendants. Plaintiff there alleged fraud in the sale of an automobile. The Court held that mere fraud was not sufficient for an award of punitive damages, but that "extreme and exceptional conduct" is required. The Court also cited prior Ohio cases which required "a gross or malicious fraud or something showing a very corrupt condition of affairs," and that the defendant's wrongdoing must be "intentional and deliberate, or have the character of outrage frequently associated with crime." 178 N.E.2d at 92. *The defendants in the case at bar were certainly guilty of "extreme and exceptional conduct" constituting a "gross fraud" which was "intentional and deliberate."* } Spec. 5(b)

Another case more recent than those relied upon by defendants is *Nagel v. Prescott & Co.,* 36 F.R.D. 445

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[2] Defendants also cite *New York, C. & S.L.R. Co. v. Grodek,* 186 N.E. 733 (1933). To the extent it is inconsistent with *Saberton* the latter must obviously control.

(N.D. Ohio 1964). Chief Judge Connel said, "Under Ohio law, in an action to recover damages for a tort which involves the ingredient of *fraud or* malice, a jury may go beyond the mere rule of compensation to the party aggrieved and award exemplary damages." 36 F.R.D. at 449 (emphasis added). The Court cited *Saberton* and quoted from *Smithhisler* the same statement at 105 N.E.2d 871 which is quoted herein at page 5, *supra*.

Defendants quote language from the *Waters* case in their favor, but the facts of the case do not sustain their position. Furthermore, to the extent there is any language in the *Waters* or *Sears* cases which is inconsistent with this Court's interpretation of Ohio law, its precedental value is negated by the more recent expression of Ohio law of the intermediate appellate court in *Levin v. Elyria Sign Co.*, 206 N.E.2d 38 (Ohio Ct. App. 1965). That court held that an award of punitive damages must be predicated upon "malice, *fraud, intentional wrongdoing or other outrageous conduct of a similar nature.*" 206 N.E.2d at 39 (emphasis added). The Court cited *Saberton, Smithhisler* and *Tunison*.

Defendants' brief also attempted to show that Ohio follows the "ratio rule" of punitive damages and, by reference to other jurisdictions, that such ratio may not exceed approximately 20 to 1. *However, as plaintiffs' counsel pointed out on oral argument, the Ohio Supreme Court in Saberton allowed plaintiff an opportunity to recover $5,000 punitive damages where compensatory damages were only $38.15. This is a ratio in excess of 128 to 1.* Spec. 8

The final argument of defendants to be considered is the contention that inasmuch as under Ohio law attorney fees in an action such as this are classed as com-

pensatory damages (even though predicated upon circumstances justifying an award of punitive damages), attorney fees can be awarded only to reimburse plaintiffs' actual out-of-pocket expenses for attorney fees and may not be awarded where, as here, the attorney is retained on a contingent fee basis. Defendants cite no Ohio cases which are directly in point. In fact, the only direct authority cited is 25 C.J.S., *Damages*, §50(d). However, the sole authority cited by C.J.S. is *Houston & T.R. Co. v. Oram*, 49 Tex. 341. One case from one state can hardly be said to establish a general rule.

If the rule contended by defendants were to be upheld it would result in an unwarranted windfall to undeserving defendants and would unjustly penalize attorneys who in good faith accepted employment on a contingency basis. Such a rule would run counter to the very policy reasons which have induced the courts to recognize contingency agreements. *Gruskay v. Simenauskas*, 140 Atl. 724 (Conn. 1928).

Furthermore, under defendants' theory, if the award of attorney fees were strictly compensatory the award would be based on the *actual* attorney fee and not on a *reasonable* attorney fee. However, it is not only the practice of Ohio trial courts in such cases to instruct in terms of a "reasonable" attorney fee, *Sears v. Holly*, 178 N.E.2d 91 (Ct. App. 1960); *Davis v. Tunison*, 155 N.E.2d 904 (1959); *Housh v. Peth*, 133 N.E.2d 340 (1956); *Waters v. Novak*, 155 N.E.2d 420 (Ct. App. 1953); *Smithhisler v. Dutter*, 105 N.E.2d 868 (1952); *Columbus Ry. Power & Light Co. v. Harrison*, 143 N.E. 32 (1924); *United Power Co. v. Matheny*, 90 N.E. 154 (1909); the Ohio appellate courts have specifically stated that the applicable standard is a "reasonable" attorney fee. *Smithhisler v. Dutter, supra; M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ct. App. 1929); *United Power Co. v. Matheny, supra; Finney v. Smith*, 31

Ohio St. 529, 27 Am. Rep. 524 (1877); *Roberts v. Mason,* 10 Ohio St. 277 (1859).

Also, if, as defendants contend, attorney fees were strictly compensatory Ohio law would necessarily require the admission of evidence of the amount of the actual attorney fee in every case where such a fee was claimed. The Ohio rule, however, has been to the contrary for over one hundred years. In *Roberts v. Mason,* 10 Ohio St. 277, 282 (1859), the Court said, "No evidence in this case appears to have been given to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received." The Court nevertheless held that "the jury, which has the power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." The rule of *Roberts v. Mason* is patently inconsistent with the rule contended for by defendants. It would therefore appear that if this Court has committed error, such error was in taking note of plaintiffs' contingent fee agreement in the first place. This is not an error of which defendants may complain.

The Court therefore finds that plaintiff Hilltop Realty, Inc. shall recover $2,920.00 as compensatory damages and that the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell shall jointly recover a like amount. The Court also awards to plaintiff Hilltop Realty, Inc. punitive damages in the amount of $40,000.00 and to the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell jointly punitive damages in the sum of $35,000.00. Such award is conditioned upon plaintiffs filing of a waiver

Spec. 2 and 3

Spec. 5 and 10

of any claim to costs in this action. *The Court awards jointly to Hilltop Realty, Inc., Mildred Winslow Ashcraft and Aileen D. Winslow Powell the sum of $75,000.00 as a reasonable attorney fee.* Such a fee will not adequately compensate plaintiffs' counsel for all of the time they have devoted to this case but the Court believes, considering all the circumstances, that such an amount is reasonable. Spec. 10

This memorandum decision, together with the prior memorandum decision of October 27, 1965, insofar as it has not been modified by this decision, shall serve as findings of fact and conclusions of law. Counsel for plaintiffs may present a form of judgment to the Court on May 6, 1966, at 9:30 a.m.

DATED this 2nd day of May, 1966.

(s) W. T. BEEKS
United States District Judge

II. EXCERPTS FROM ADMITTED FACTS SECTION OF PRETRIAL ORDER (R. 1054-1265)*

1. Plaintiff Hilltop Realty, Inc., hereinafter called Hilltop, at all times material hereto was and is now a corporation incorporated under the laws of Ohio with its sole office at Lyndhurst, Ohio, an eastern suburb of Cleveland, except that it had an office in Willoughby, Ohio, another eastern suburb of Cleveland, from 1961 to early 1963. Hilltop was engaged in the sale of real estate, primarily residential, in the eastern suburbs of Cleveland. Henry Petti was president of Hilltop. . . .

2. Plaintiff Mildred Winslow Ashcraft was married to Edwin W. Ashcraft in June, 1962. At all times material hereto she has been a resident of Washington, D.C.

*References in said admitted facts to sources thereof, in the pre-trial record, i.e., to depositions or exhibits, have been deleted.

3. Plaintiff Aileen D. Winslow Powell, a widow, is a sister of Mrs. Ashcraft. She is now and was at all times herein mentioned a resident of St. Thomas, Virgin Islands. The sisters are very close. Mrs. Ashcraft resided in Washington, D.C., and Mrs. Powell resided in the Virgin Islands during the years when Hilltop acted as real estate broker for them. The sisters made occasional trips to Cleveland during the period and conferred with Mr. O'Neill.

4. In 1951, Mrs. Ashcraft and Mrs. Powell inherited from their widowed mother the family's country estate known as Nutwood Farm. The estate, which consisted of 238 acres, was still actively farmed. . . . Neither Mrs. Ashcraft nor Mrs. Powell has had any experience or interest in the real estate field or in the shopping center industry. . . . In 1955 the sisters sold 54 acres of Nutwood, including the residence and farm buildings, to the College of Telsche, for $230,000.00. This was done on the advice of Wilbert J. O'Neill, their family legal and business advisor. In the same year they sold 1.06 acres for $15,000.00.

5. The portion of Nutwood Farms remaining after the foregoing sales consisted of 175.189 acres. On April 29, 1960, the sisters sold Nutwood to the Ridge Hills Development Company for $613,161.00. They now have no interest in the property. In January, 1961, the State of Ohio acquired from Ridge Hills Development Company, for highway purposes, approximately 26 acres for about $190,000, for construction of the Euclid Spur which has now been constructed to connect Ohio State Route 1 (North-South Freeway) with the Lakeland Freeway. Neither the Euclid Spur nor either of these two freeways had been constructed at the time of the sale to Ridge Hills Development Company on April 29, 1960, though the Ohio State Highway Department esti-

mated that the Euclid Spur would be open to traffic by the end of 1962.

6(a). Nutwood was located partly in Wickliffe, Willoughby Hills and Euclid until about January, 1961, when the portion in the City of Euclid was taken by the State of Ohio for highway purposes. Nutwood was located in the eastern suburbs of Cleveland, Ohio, at the northwest corner of the intersection of Chardon Road (U.S. Highway 6) and Bishop Road (Ohio State Highway 84) in western Lake County, about fourteen straight line miles northeast of downtown Cleveland. A portion of the property extended north as far as Euclid Avenue (U.S. Highway 20). It now adjoins the Euclid Spur, Interstate 90, and its Bishop Road interchange.

(b) During the entire period from 1955 to 1959, both Severance and Nutwood Farms continued to be unimproved acreages, except for a family residence and related buildings on each. . . .

7. At all times material hereto defendant Larry Smith & Company, herein termed "Smith," was a real estate consultant with its home office in Seattle, Washington, and branch offices in Washington, D.C., New York, Chicago and elsewhere.

* * *

9. Defendant Larry Smith & Company is a partnership now consisting of eight defendant partners, namely, Larry Smith, Frank A. Orrico and Ian McConnachie, Washington residents; Harold R. Imus, a Maryland resident; F. Keith Kelly and James O. York, California residents; C. Everett Steichen and C. Ake Orndahl, residents of New York. Robert J. Crabb withdrew as a member of the partnership some time prior to 1959. Frederick C. Arpke, a Washington resident, withdrew from the partnership as of April 1, 1962, and Dee R.

Eberhart, a California resident, withdrew as of June 1, 1965. McConnachie, Orndahl, Imus and York became partners as of August 1, 1960. Kelly, Eberhart and Steichen became partners as of August 1, 1962. As of the date of the filing of the original Complaint herein the residence of the partners was the same as it is now except that York and Eberhart were then residents of Washington. In or about October, 1963, Eberhart had been transferred by Smith to California and resided there until he withdrew as a partner on June 1, 1965.

10. Ray L. Treiger is now an employee of and Assistant Vice-President of Winmar Realty Development Company, having been elected to that position on October 17, 1960. He is now and has been at all times since September 30, 1960, a resident of the State of New York. He commenced work for Smith in 1951 in Seattle, Washington. In 1954, he went to New York as an analyst and assistant to Larry Smith. In August, 1957, he was transferred to the Washington, D.C., office of Smith. In that year he was made Assistant Manager of the Eastern Division of Smith with offices in Washington, D.C., and held that position, which involved direct client contact and the use of discretion in an executive position, until September 30, 1960, when he became Assistant to the New York Area Manager of Winmar Realty Development Company, Inc., in New York City. He was served in New York State with a copy of the original Complaint in January, 1963, and with a copy of the First Amended Complaint in New York State on July 31, 1964. Mr. Treiger worked on studies of the Severance Shopping Center Development until September, 1960, as aforesaid. Treiger's first connection with the work done on the Severance Center was in about May of 1955. He was in charge of work for plaintiff Hilltop on the Nutwood property Shopping Center Analysis. . . .

* * *

14. The Austin Company, hereinafter called "Austin," is now and was at all times material hereto a corporation organized and existing under the laws of Ohio, with its principal place of business in Cleveland, Ohio. It has offices in Cleveland, Detroit, Houston, Los Angeles, Seattle and elsewhere in the United States and has affiliates in several foreign countries.

15. Wilbert J. O'Neill is and was at all times material hereto an attorney at law practicing in Cleveland, Ohio. He acted as legal and business advisor since the early 1930s to Mrs. Asheraft and Mrs. Powell, and advised them in connection with the sale of Nutwood Farms. . . .

16. About the year 1954, Severance Millikin was the owner of a residential estate known as Longwood in Cleveland Heights, Ohio, consisting of about 151 acres. . . . In 1954, he employed The Austin Company to try to have the property rezoned. On December 20, 1954, the City of Cleveland Heights enacted Ordinance No. 73-1953, whereby the Severance site was zoned for development as a shopping center, commercial and professional office park and multiple family project. A taxpayer's action against the City of Cleveland Heights resulted from the enactment of Ordinance No. 73-1953. The rezoning was finally upheld on June 28, 1957, by the Court of Appeals for Cuyahoga County, Ohio, in its decision of *Sam D. Magid v. City of Cleveland Heights, et al.*, 143 N.E.2d 718. The taxpayer's subsequent appeal to the Supreme Court of Ohio was dismissed on December 18, 1957, in *Magid v. City of Cleveland Heights, et al.*, 146 N.E.2d 597. On April 7, 1958, Ordinance No. 13-1958 was enacted by the City of Cleveland Heights. This ordinance amended Ordinance No. 73-1953 to permit supermarkets in the Severance Center. . . .

17. After the 1954 rezoning, Millikin indicated that he desired The Austin Company to carry out the development of the property. Millikin and Austin agreed to the formation of a new corporation, Longwood Properties, Incorporated, in which each would have an interest. Title to Longwood was transferred to this corporation, and thereafter to a successor corporation, Severance Estate, Incorporated.

* * *

20. On September 3, 1954, Larry Smith wrote The Austin Company concerning services to be performed in connection with the development of Severance. This was apparently the initial contact between Smith and Austin.

* * *

32. In May, 1955, Austin employed Smith as its consultant in connection with the development of the Severance site, at a monthly retainer of $2,500.00. Pursuant to this responsibility, Smith prepared a number of brochures containing economic analyses which expressed its opinion that the Severance site was well adapted to the development of a large regional shopping center. Also, pursuant to this employment Smith prepared materials for presentation to prospective tenants of Severance Center. After the monthly retainer was reduced to $500 in May, 1956, Smith prepared other brochures on the subject of Severance. After the monthly retainer terminated in July, 1959, Smith produced further brochures. After February, 1960, it produced further brochures. . . .

* * *

42. In July, 1955, Austin paid to Millikin and to Longwood Properties, Incorporated, a total of $750,000 for stock representing the three-quarter ownership of Longwood Properties, Incorporated, a company whose chief asset was the 150-acre Severance property, which

includes both the Severance Center and the adjacent land owned by C.H.A. Corporation. . . .

* * *

62. On November 2, 1955, *The Cleveland Press* announced:

> "Ninety acres of park and office building surrounding a 60-acre island of quality stores are included in a unique preliminary plan for the Severance Millikin estate, Longwood, in Cleveland Heights, it was revealed today.
>
> ". . .
>
> "The land-use plan was developed after 10 months of study. The proposal will be referred to Cleveland Heights councilmen as a committee of the whole at next Monday's meeting."

* * *

65. On or about November 29, 1955, Eden and Associates, public relations counsel for Severance, prepared a news release which stated in part:

> "The character and scope of office buildings, campus-type research laboratories and commercial establishments being planned for the 151-acre wooded Severance Millikin Estate at Mayfield and Taylor Roads, were disclosed today as executives of Longwood Properties Incorporated prepared to discuss their preliminary land-use plans with members of the Cleveland Heights City Council.
>
> ". . .
>
> "In submitting the preliminary land-use map in compliance with the city ordinance adopted last December, which released the land for other than residential development, Beatty disclosed that the Austin organization. . . . has been working for many months with several of the country's leading authorities on traffic, economics, consumer attitudes and merchandising. These consultants have included:

"Larry Smith & Co. of New York, Washington, D.C. and Seattle, real estate economists. Consultants to Hudson's, Macy's, Eaton's of Canada and for important commercial developments coast-to-coast."

* * *

147. On May 29, 1958, the Directors of Austin adopted the following resolution:

"RESOLVED, That considering our lack of specialized personnel for leasing and continued promotion and management of a Shopping Center Development at Longwood, as well as the possible investment required and estimated profit results, it is not considered a desirable project for The Austin Company, and Severance A. Millikin shall be so notified in accordance with Agreement of April 13, 1955."

Accordingly, Austin decided to sell and asked Smith to help in obtaining a buyer for Austin's interest.

* * *

152. In the summer of 1958 Smith prepared materials for Austin to present to prospective purchasers of the property and talked to several investors on behalf of Austin.

* * *

156. On July 25, 1958, Mr. O'Neill, on behalf of the Winslow sisters, wrote a letter to Hilltop Realty outlining a proposal as follows:

"Referring to your letter of May 24, 1958, and our several previous discussions, and subject to the approval of my clients, herein provided for, I am outlining herein the terms and conditions on which I think they would be willing to arrange for your proposed attempt to find a purchaser for the development of the south part of the so-called Nutwood property as a regional retail center, similar to the Northland Center or Eastland Center in Detroit.

"The owners would not be willing to grant to you any authority to bind them by any contracts for sale or development of the property or to fix the price or terms of sale or lease, and would be unwilling to be committed to any piece-meal sale of parts of the property, being interested only in an overall development and sale.

"There would of course have to be excluded from the property subject to the proposed arrangement any property sold to the State of Ohio, or other authority, for freeway purposes or appropriated therefore and any compensation allowed for damage to the residue involved in any such freeway development. The terms of compensation outlined in your letter of May 24, 1958 seem to be fair and reasonable but no option or interest in the property itself is to be acquired by your company and the owners will have to determine whether any proposed sale is acceptable. In other words, we would wish to have it clear that you did not have authority, for example to commit the owners to a sale at $350,000.00 (on which your compensation would be $10,000.00) leaving the purchaser at such sale to realize any value in excess of $350,000.00 even though such higher price appeared at the time to be reasonable for the property. If such sale were available to the owners with a ready, able and willing buyer, you would, of course, be entitled to the prescribed compensation on the price offered and the owners would be entitled to the data you had accumulated and would be free to terminate the agency, unless they wished to renew your authorization on new terms.

"In summary, the owners are not willing to turn over to you the control of the sale or development of the property or any proprietary interest in the property, but I am proposing that they give to you an exclusive authorization for a period of six (6) months from the date their written approval of this proposal to undertake at your own expense to find a buyer for the property for a regional retail center, you to devote your efforts and funds to

the undertakings as outlined in paragraph (1) of the terms and conditions in your letter of May 24, 1958 to me, subject to the condition that no application for zoning changes may be made without the express approval of the owners and you are to be entitled to compensation as outlined in paragraph (3) of the terms and conditions of your letter of May 24, 1958. Said paragraphs (1) and (3) read as follows:

"'(1) Hilltop Realty, Inc., together with any assistance offered it by the owners or their representatives, will expend its time, energy and finances, through its officers, employees and such hired experts as may be necessary, (a) to further explore the potential use of the property, (b) to seek interested persons, firms or corporations who will develop and improve the premises or finance same, whereby commercial or industrial buildings may be erected and occupants obtained, and (c) to seek such zoning changes as may be required and thus accrue to the owners the best return on their interests.

"'(3) Should Hilltop Realty, Inc. be successful in its efforts to develop and improve the property and/or procure a purchaser or lessee, it is our proposal that we share in the resulting increased valuation according to the following schedule:

Selling Price (Land exclusive of freeway)	*Hilltop's Share*
$250,000 or less	None
$250,000 to $350,000	10% of excess over $250,000
$350,000 to $450,000	$10,000 plus 15% of excess over $350,000
Over $450,000	$25,000 plus 25% of excess over $450,000

Ground Lease—5% of the value of the net annual rental capitalized at 5%

Building Lease—The then current rate of commission as recommended by the Cleveland Real Estate Board.'"

"You mention that the Nutwood property consists of approximately 170 acres. I think this is

about right but that acreage includes all of the Nutwood Farm not sold to the College of Telshe. A very substantial part of that 170 acres is likely to be involved in purchase or appropriation for the so-called Euclid spur or freeway development and some area not to be taken for the freeway development would lie north and east of the proposed Euclid spur. I think that the area south of the proposed Euclid spur would be approximately 130 acres of which about 99 acres are in Willoughby Hills and the balance in Wickliffe.

"You should have in mind that we have not been willing to consider a price of less than $2500 per acre for the whole area south of the proposed Euclid spur.

"In working out any program, you would be authorized to consult with me as the representative of the owners, unless and until they made other arrangements. This should avoid the delay of communication with them except in any situation in which it appeared to me to be necessary to get special authorization from them.

"I understand that you have reason to believe that either Sears, Roebuck & Company or the Wm. Taylor Son & Company might be interested in a proposed development, such as you have in mind, and, assuming the approval by the owners of the program outlined in this letter, I think you would be reasonably safe in sounding them out in a preliminary way pending receipt of formal approval from the owners, provision for which you will note I have appended to copies of this letter.

"Except as modified herein, the terms of your proposal of May 24, 1958, to me are adopted. If the foregoing is agreeable to you, will you kindly note your approval on both accompanying copies of this letter and return them to me."

The proposal was approved and agreed to by Hilltop Realty and by the Winslow sisters, additional plaintiffs herein, on July 29, 1958.

* * *

171. On December 15, 1958, Treiger wrote Frank Orrico [a Smith partner]:

* * *

"The Austin Company would also be willing to sell the entire project, including the fringe area identified on the map opposite page 3.

"At one time you spoke about the possibility of being interested in it. Larry has too. I have not discussed this for a long time with Larry. I am sending this material to you for your review, and perhaps you might want to talk about it on your next trip east."

* * *

177. Commencing in January 1959, Smith carried on discussions with Lambert & Company, now a Connecticut investment firm, which then had its offices at 2 Wall Street, New York, New York, concerning the possibility of participating in the purchase of or assisting in financing Smith's purchase of Severance.

* * *

179. On February 10, 1959, Austin paid to Severance A. Millikin $750,000 for stock in Longwood Properties, Inc., representing the final one-quarter ownership of the company whose chief asset was the 150-acre Severance property.

* * *

182. On Sunday, February 22, 1959, the Cleveland Plain Dealer carried a news story which read in part as follows:

"The Higbee Co. yesterday announced plans for its first branch store.

"It will be located on the 151-acre Severance estate on the southeast corner of Mayfield and Taylor Roads, Cleveland Heights.

"Higbee's will be the second major department store with a branch at this location. The Halle Bros. Co. has been planning a branch there since 1957.

"John P. Murphy, Higbee president, made the announcement. He said he hoped this store would be ready for business by the fall of 1960.

" 'Our company has been giving thought to the establishment of a branch store in Cleveland for some time,' Murphy said, 'and we have come to the conclusion that the outstanding location and opportunity for us would be to join with the Halle Bros. Co. and other stores in establishing a suburban store on the Severance estate.'

"Toward this end, Higbee's is negotiating a contract with the Austin Co., builders.

"L. Paul Gilmore, vice president-treasurer of the Austin Co., said the decisions of Halle's and Higbee's had paved the way for full planning and leasing of the area. . . .

"Walter M. Halle, president of Halle's, welcomed the Higbee branch, saying the shopping center could duplicate downtown shopping facilities."

183. On Monday, February 23, 1959, Crume of Hilltop wrote Charles S. Knight, site planning consultant retained by Hilltop for Nutwood:

"This will confirm our authorization for you to contact Mr. Frank Thomas, Wickliffe City Engineer concerning available utilities for the development of the Nutwood property.

"Attached is the material from our files that Mr. Petti thought might be of interest to you. In view of developments over the week-end, it is probable that we might have to give more consideration to the multiple use of this property with less area of retail development.

"We hope to be able to arrange a meeting with Mr. Wilbert O'Neill, attorney for the owners of

Nutwood, on Tuesday afternoon or Wednesday of next week. We will let you know later of the definite time, and if it will be convenient for you we would like very much to have you present."

184. On February 24, 1959, Treiger prepared a memorandum stating:

"Paul Gillmore called to tell me that the announcement had been made in the newspaper on Sunday that both stores were going into Longwood so that the deal is "official" (although leases have not been signed with either store).

"Paul said that they were working their heads off developing the new architectural concepts, but in the meantime, the Austin Company is prodding him to get busy on undertaking the negotiations for the sale of the property. He therefore said that he would appreciate an expression of our attitude and opinion as to whether we were going to be interested in negotiating for it, within the next couple of weeks so that we could get started on conducting a negotiation with somebody else if we were not going to be interested ourselves and he felt that it was important to advise his board of directors accordingly very shortly."

* * *

192. On April 30, 1959, Treiger wrote a memorandum to Larry Smith stating that Beatty of Austin had asked him to emphasize Gilmore's request that Smith be in a position to advise them on Smith's intent as soon as possible—"purchase or work for a sale in their interests."

* * *

203. In June 1959, Mr. O'Neill wrote a memorandum of a conversation with Mr. John P. Murphy, Higbee's president, as follows:

"Talked today with Mr. Murphy of the Higbee Company. He told me that they were set to go to the Severance Millikin location and that their store

was to be the primary store and Halle's the secondary store—this being at the insistence not only of the Higbee Company but of the people who are promoting the development.

"While Mr. Murphy avoided comment on Halle management, he did not challenge my statement that Halle's was spread too thin with the sample order store at Shaker Square, another one at Cedar-Warrensville Center and now one proposed on the Millikin property. He also recognized that an awful lot of market in the Mayfield-Taylor Road location is being supplied by stores at other corners all along Mayfield Road from the Chagrin River in.

"He also indicated some doubt as to whether the Taylor Road location was far enough out from Cleveland or Shaker Square and agreed that our location 16 miles from the Square is a good one. He indicated that great reliance was placed on the Larry Smith report and that the report by another survey organization (Meyer(?)) did not favor the Millikin location so much but that both recognized that the bulk of the plush trade on which such stores rely was from the Kirtland Hills, Pepper Pike, Chagrin Falls residential areas. I did not argue with him that no store could live on the plush trade in these days when the buying power is from widely distributed areas and that other stores along Mayfield and elsewhere in the vicinity of Taylor and Mayfield are already taking up a lot of this trade.

"I told Petti today that if he is planning to make a market survey he ought to have Knight check with Smith and Meyers, particularly the latter, because their report undoubtedly makes an argument favorable to our location as against the Millikin location.

"Petti indicated that he also had learned that the promoters of the Millikin location required that the Higbee and not Halle's be the first store and that Strawbridge had so stated. I suggested that Sterling-Lindner-Davis might fit in better with

Higbee at the Millikin location but Murphy said that had been considered and rejected, as it was thought that area required two of the highest grade stores. Murphy told me that it was the Austin Company which insisted on Higbee, not Halle's being the first store.

"Murphy stressed the fact that the Smith report indicated that the area immediately surrounding the Millikin location was densely built up high-grade residential area from which they might expect great support.

* * *

205. On July 2, 1959, a further agreement was entered into between plaintiffs Mrs. Ashcraft and Mrs. Powell and Hilltop, which provided in part as follows:

"B. In addition to its efforts to promote, develop and find a buyer for Nutwood Farms, Hilltop Realty, Inc. will seek to accomplish, at its own expense, certain specific objectives as follows.

1. *Ramps* east of Bishop Road connecting with the Euclid Spur at Bishop Road and leading to and from the east. One of the following:
   a. Commitments from the State Highway Department for the construction of the ramps.
   b. Appropriation by the State of Ohio or other political subdivision of specific land sufficient to accommodate the future construction of the ramps.
   c. Private control of specific land sufficient to accommodate the future construction of the ramps.
2. *A market analysis* of the Nutwood Trading Area by a nationally recognized market analyst.
3. *A detailed engineering study* covering water, sanitary sewer, and storm drainage relative to the Nutwood development and including consultation with such of the following as

may be necessary: City of Cleveland Water Department, City of Euclid, City of Wickliffe, Village of Willoughby Hills, Lake County, Cuyahoga County and Ohio State Highway Department.

4. *Commitments* from the City of Wickliffe and the Village of Willoughby Hills to lend their cooperative efforts in any way which may be required for, or which may facilitate, the development of the Nutwood property.

5. *Letter(s) of interest* from a major tenant for the proposed retail development, or a major occupant of the property, or three secondary tenants (such as variety store, supermarket or junior department store) for a retail development.

"C. If prior to December 31, 1959 two of the objectives outlined in paragraph B above shall have been accomplished, then, this agreement shall be extended until December 31, 1960.

"D. *Price:* $3500.00 per acre ($595,000.00) or any price or exchange to which the seller may consent. It is recognized that as work proceeds a modification in the list price may be justified and advisable."

Under this agreement the commission was stipulated to be:

"Fifty percent (50%) of the gross sales price in excess of $500,000.00."

206. In July, 1959 Smith re-evaluated the shopping center potential of the Severance property. This analysis substantiated the conclusions of earlier studies made by Smith. Field work for this re-analysis was done in July, 1959. . . .

* * *

218. As of July 31, 1959, the retainer relationship between Smith and Austin was terminated. Austin and

Smith were then engaged in active negotiations for the sale of Severance to Smith. Austin advised Smith that if Smith did not become the purchaser of Severance it would be compensated for its services after July 31, 1959. Austin made its final payment to Smith in July 1959.

* * *

221. Mr. Petti wrote to Mr. O'Neill on August 3, 1959, that he understood that The Higbee Company "has already or is very close to signing a lease at Longwood [Severance]. Hilltop read in the press during the summer of 1959 that the Halle Bros. Company and The Higbee Company were committed to go into Severance Center.

* * *

229. On September 14, 1959, Hilltop wrote Larry Smith & Co. and two other market analysts asking for quotations on market studies of Nutwood for regional retail and commercial purposes. These letters read as follows:

> "We are the representatives of the owners of a 130 acre parcel of relatively level, vacant land lying contiguous to the proposed Euclid Spur which connects Ohio State Route #1 with the Lakeland Freeway. Both of these highways are part of the new Freeway program of Greater Cleveland. The site adjoins the Cuyahoga-Lake County line in the heart of North-eastern Greater Cleveland and is about 15 miles from down-town Cleveland.
>
> "It is our belief that this location has an excellent potential for the development for a regional retail and commercial complex. We would be interested in your recommendations as to the type of market analysis which would best serve our purpose and would be pleased to receive a quotation on your fee for such a study."

230. Minutes of Austin's Board of Directors of a meeting on September 23, 1959, read in part:

"He (Gilmore) stated that continued efforts have been made since December and it now appeared that Larry Smith, acting on behalf of himself and other investors was prepared to enter into an agreement with Austin for acquisition of Severance Estate Incorporated."

231. On September 24, 1959, Ray Treiger wrote an inter-office memorandum to defendant Ake Orndahl, who was then manager of Smith's New York office, concerning Treiger's receipt of Hilltop's letter of September 14, 1959 and reporting his subsequent telephone call to Petti of Hilltop:

"I've had a long talk with Mr. Petti. The property is in what we consider the secondary area of Longwood's trade area. (You'll note in the letter that the property is one the boundary of Lake and Cuyahoga Counties.)

"I do not think that we will find potential for regional center development at this property, in spite of what appears to be regional access—or at least future regional access after the freeways are completed. I also think that whatever center is developed there would have very little impact toward the west because of the May Company development and because of Longwood. On the other hand, the May Company branch stores license plate distribution indicated little penetration out this far (I don't know whether that's because of insufficient drawing power or insufficient population existing there).

"I told Petti that we are working on the Longwood property and felt that there might be some conflict in our own position. He said that he did not think that there would be because he did not think that his property would pull very far from the west. He said that he might pull 20 miles from the east, but if it went two miles to the west, he'd be lucky.

"The guy seems very intelligent and accepted the fact that the property may not be any good at all for a shopping center and possibly was better for industrial. There is a very heavy industrial concentration in this general area, I understand although I'm not sure about this. He is not aware, of course, of our possible ownership position there, but accepted our reputation and the fact that he could expect an objective study from us, almost regardless of the fact that we were working for the Severance estate.

"I am not sure I know how to handle this, in view of our possible investment position, and since this is your realm, I'd like to get your opinion on it."

232. On September 30, 1959, Treiger wrote Hilltop a letter proposal to make a "Shopping Center Analysis" of Nutwood for $4,500. In this letter, Treiger stated:

"Our study will involve an analysis of the following factors:

"a. A delineation of the trade area which would be served by the shopping center at the subject site and a determination of its various zones of influence.

"b. Population of the trade area with an indication as to growth possibilities.

"c. Consideration of the traffic situation existing by reason of the proposed uses, transportation situation, including possibilities of pedestrian traffic, public transportation and the arterial pattern which will serve the site and the trade area residents.

"d. Income and purchasing power of the trade area population and the determination of the relationship of that purchasing power to the proposed development.

"e. An estimate of existing sales potential and probable future competition, considering pres-

ent retail facilities and the future community needs for such facilities.

"f. An estimate of sales potential available to the new retail facilities within the trade area."

Treiger also stated:

"Our report is basically *an owner's* report, to guide the owner in his planning of the development of his property.

* * *

"Our fee for undertaking the site analysis under the alternative discussed above would amount to $4,500 and would require 90 days for completion. It is possible that the time period might be shortened and we would attempt to complete our work within a shorter period."

233. On September 30, 1959, Treiger wrote a memorandum as follows:

"After speaking to Ake [Orndahl] on the 29th. I agreed that we ought to try and handle this inquiry. I spoke to Mr. Petti and told him that as long as he recognized the fact that we have been acting on the Severance Estate for some three years, we believed that we could act for him. He said that that would be fine and that he was pleased that we had taken the four days to think about the ethical conflicts of interest problem (I first talked to him and related the fact that we were working on the Severance Estate, Monday, the 28th) and he was satisfied with our position and asked that we submit a specific proposal. This is being done in a separate letter under today's date."

At the time of the taking of his deposition, Orndahl did not remember participating in any such conversation.

234. On October 5, 1959, Treiger wrote a memorandum, re: Hilltop Realty, as follows:

"I called Mr. Petti to find out the status of our proposal letter, toward the end of the previous

week. He asked if it would be possible for me to come out there for a personal meeting before going any further with the transaction. We therefore agreed that I would be out there for a meeting in Cleveland on the 8th of October."

235. On October 8, 1959, Treiger went to Cleveland for a conference with Hilltop. He prepared a memorandum concerning this conference as follows:

"I spent three or four hours with Mr. Petti, an associate of his, and a Mr. O'Neil, who is an attorney representing the family who owns the property. Petti's real estate company is a relatively small one, primarily involved in residential property, I understand, but their office is in a very small shopping center which includes two or three stores, on Mayfield Boulevard about four miles due east of the Longwood property. The property that they are considering, called "Nutwood Farm," is on the county line, in a pretty strategic location, I would say, after the development of the highway program which is now contemplated. We spent two or three hours driving around the property, the trade area, and discussing the report and the type of analysis that we would undertake. The area is experiencing rapid residential and industrial development.

"What we already know about the area, there's not too much new to add to this file memorandum, except to say that I think that the chances of us landing this job are probably 60-40."

* * *

237. On October 9, 1959, Mr. O'Neill wrote a memorandum of the meeting of October 8 with Petti, Crume and Treiger as follows:

"I met yesterday with Messrs. Petti, Crume and Ray L. Treiger, who represents Larry Smith & Co., real estate consultants of Washington, D.C. The meeting had been arranged by Mr. Petti with Mr. Treiger to discuss a proposal by Larry Smith & Co. for a survey to determine the availability of

Nutwood as a site for a regional shopping center developments.

"Petti showed me proposals he had received from two other such consultants but the Smith proposal seemed most interesting, notwithstanding the fact that Smith & Co. had acted as consultants on whose advice at least partly the decision had been made by Higbee's and Halle's to go into the Longwood development at Mayfield and Taylor Roads. Treiger told us that his company had become advisers on this Longwood project for the Austin Company and Severance Millikin, after the Longwood area had been zoned for retail development but with an exclusion of any super-market. The area of course has since been re-zoned to permit a supermarket development, and after extensive litigation it was considered that it was legally possible now to go ahead with the Longwood development project. Treiger emphasized the possible conflict of interest between his firm's loyalty to Austin and Severance and any recommedations he might make to the promoters of the Nutwood project. I called Petti's attention to the fact that this loyalty to Austin and Severance might reasonably be expected to prevent Smith & Co. from making any recommendations or using other influence to induce Higbee, Halle or any other prospective tenant to go into a Nutwood development if that would interfere with their commitments to the Longwood project, but it was considered worth while to get Smith's survey and recommendations, having in mind that his work on the Longwood project had given him a great deal of background information, which would be useful on other phases of the project besides the matter of department store tenancies.

* * *

"Mr. Petti told me that he had an appointment at Youngstown on Monday with the site engineer for the Bardolo organization to discuss the possibility of a Nutwood development. He indicated that Bardolo told him he would rather have his own

site engineers report on the possibilities than any of the location experts with whom we had had communications. Petti told me that he would not decide whether to employ Smith until after he had had his meeting with Bardolo representatives. He showed me a U.S. Shopping Center Directory which indicated that Bardolo had enormous activities in the Youngstown-Akron and other areas throughout Ohio and it appeared from the directory that Bardolo is the principal in all of these activities. Petti said that Bardolo indicated to him that he was negotiating sales of some of the developments which would provide him with ample funds to go ahead with the Nutwood development if it seemed advisable.

* * *

240. On the same date, October 19, 1959, Treiger wrote a memorandum concerning Petti:

"Mr. Petti told me that his associates and the attorney, Mr. O'Neill, decided to go ahead with our survey. However, following that decision, 'one of the biggest national developers' (unidentified) approached the owners of the property with the idea of taking it over and developing it. On that basis, the owners did not want to go ahead with the expenditure for the market analysis which would only be of value to them if they themselves developed the property. This 'national developer' has been given until November 10th for a firm proposal. I told Mr. Petti that I felt that that made sense from their standpoint, and that we would be waiting, in the meantime, to hear from them if they decide to go ahead with our work. Consequently, there's nothing for us to do, except check this out on about the 15th of November, 1959."

* * *

246. On November 16, 1959, Treiger wrote to Petti as follows:

"I have a note on my calendar to write to you about now to find out if the discussions were still

progressing between the owners of the farm and the prospective developer, who you told me about when we last chatted on the telephone."

* * *

250. On November 20, 1959, Larry Smith wrote Frank Orrico a memorandum in [partial] text as follows:

"I assume that your files on this should be reasonably complete, but I am asking the girls to check up today with Doris by phone to find out whether copies of the significant letters and memoranda are available. The situation, as I understand it historically and at the minute, is covered in this letter. I think that we have to keep the whole story in mind in our relations with Austin's, or we may find ourselves in difficulty as far as further negotiations are concerned.

1. The negotiations for this property have been running along since January or February in fairly active terms. The price question was pretty well established in March or April, at which time we had the original serious discussions with Lambert. The price range between $3,750,000 and $4,250,000 was established in conversation with Paul Gilmore before he went to Europe on the 1st of June, and was finally confirmed at the $4 million figure with their withdrawing the 10 acres for their own use about the end of July. I don't have the file in front of me, so the question of dates may be out a few days. However, the sequence of events is quite clear.

2. So far as I know, we did not have any draft of the lease for examination from our purchase standpoint until about April or May. I believe that Ray had a copy of the lease in its original draft form some three or four months earlier. At that time I was looking at it primarily from the standpoint of The Austin Company, who had some pretty definite ideas about some things, particularly utilities and other matters of that kind.

3. In May when it became apparent that we were going to have a serious interest in the negotiation for the property, Paul Gilmore suggested that we should undertake three things:

   a. The conclusion of the lease negotiations with the department stores;

   b. An examination of the economics of the utility system, the basis of negotiation with the other tenants;

   c. The contact with any prospective tenants, such as the medical and dental people.

"His argument was that these matters would be of greater significance to us than they would be to The Austin Company and that we should probably, for our own protection, handle these matters.

"He offered to make a deal with us that in the event of our *not* acquiring the property, the Austin Company would pay us whatever fee we required to cover our costs and pay us a profit for anything that might be done in these respects. In other words, he was not trying to get something done for nothing, but was essentially trying to protect us. His point of view was that we were not (to use his own words) being 'diligent' in protecting our own interests when we were completely familiar with these matters by leaving the responsibility for negotiations in their hands since the price was already settled and we could only be injured by their inability to handle these matters efficiently.

"I have no intention of referring to the responsibility for our failing to do this *except* to point out that it will come with *extremely* bad grace from us now to raise any question of either timing or anything with reference to the plan or the form of lease or the treatment of utilities when we had the opportunity of doing so six months ago. I am sure also that The Austin Company are frustrated as far as time is concerned in getting these leases signed. The responsibility in that particular respect might be very largely their own, but, if so, we are not in a

position to criticize because they asked us to do it and offered to pay us if the benefits did not run to us in our own purchase. Consequently, if anything that we suggest now results in further delay on the contract signature, including both the leases and our own contract, The Austin Company will take a very dim view of it.

"I feel that this is so much the case that they might even propose our offering the property to someone else at even the same or a lower price than we might be prepared to pay ourselves if we attempt to either re-trade the price on to be unreasonable in setting up a time schedule on the basis of the difficulty in getting department store leases signed.

"I have had to face this situation ever since last May or June, and I think that the relationship is such that we will not have any question initiated by The Austin Company. They have simply accepted the situation and are trying to work toward a conclusion. If, however, we broach the subject in such a way that it indicated that we felt that they had any share of the responsibility for the present difficulty, I am sure that they would resent it seriously and that is what I am trying to avoid.

"I agree with you that we ought to sit down and try to set up our program on this right away. There are obviously at least four points involved:

1. The negotiation with Austin's;
2. The negotiation of any major leases, such as the department stores, or any other transactions, such as the medical and dental building, which for any reason must be handled in the meantime.
3. The management activity such as would ordinarily be carried on by any prospective buyer, including architectural concepts, utility studies, rent schedules, merchandise plans, renting brochures, renting procedure, etc.

4. Financing negotiation.

* * *

253. On December 5, 1959, Petti wrote a letter to Treiger, with a copy to O'Neill, as follows:

> "Enclosed is your letter of September 30, 1959 outlining a proposal for an economic analysis relating to the land use of property known as Nutwood Farm located in Lake County, Ohio. Our authority to proceed with the study as set forth in the letter is affixed with the understanding that payment of your fee shall be made in accordance with terms agreed upon in our telephone conversation of December 4, 1959; that is, $1500.00 upon delivery of the completed report and $1000.00 every thirty (30) days until the balance is paid in full."

254. On December 7, 1959, Treiger wrote Petti, as follows:

> "This is to acknowledge your letter of December 5th and to indicate our agreement with the proposed terms suggested in your letter.
>
> "I have already, as a matter of fact, outlined our field work instructions, and the field work will be undertaken within the next ten days to two weeks, just as soon as it can be scheduled.
>
> "We will be in touch with you as the work goes ahead, and we look forward to working with you on this project."

* * *

256. On December 11, 1959, Head, Production Manager of Smith's Washington, D.C. office, wrote Petti, as follows:

> "This is simply a note to inform you that our field man, Tom Darmstadter, will be in your area on Monday, December 14, and will contact you sometime during the morning hours."

257. On the same date, December 11, 1959, John Marshall, a report writer and economic analyst in Smith's Washington, D.C. office, wrote an interoffice memorandum entitled "Field Instructions—Hilltop Realty (Nutwood Farms)" to Tom Darmstadter, as follows:

> "As we discussed, this a three-stage prime farm study. As a result of John T's work on Longwood, we are in excellent shape from the standpoint of most competition and population information. However, we will require all competition to be checked within a three-mile radius of the site, which is located at the northwest corner of Chardon and Bishop Roads in Lyndhurst.
>
> "I have delineated this primary zone to be roughly bounded as follows:
>
> North: Lake Erie and Euclid Avenue (east from Rush Road)
> East: Chagrin River Road
> South: Wilson Mills Road
> West: Nottingham Road
>
> "Secondary zone should check GAF comp. approx. 20 miles NE, E, SE.
>
> "Since we have no information on either the Sears unit at Shoregate Center near Lake Shore Blvd. and East 305th Street, or the unit at 105th Street and Cedar Road, please obtain these areas. (The latter will be more applicable to Longwood.)
>
> "You should be especially careful in checking the following locations as numbered on JT's competition map to see if any additions or corrections have occurred: #20, 21, 22, 23, 24, 25, 26, and 35.
>
> "Please be alert for any new freestanding competition including discounters (e.g. Atlantic Mills, etc.)
>
> "Any new planned shopping developments including Golden Gate Plaza, and Mayland Shopping Center (these two are located on Mayfield Road

west of S.O.M. Center Road) should, of course, be investigated.

"Mr. Petti will be notified in advance of your Sunday night arrival, so please contact him as soon as feasible on Monday.

"A visit to the Lake County seat at Painesville and the Geauga County seat at Chardon might provide other information of value to us. Contacting local newspapers or utilities in the two eastern counties could prove fruitful from a research standpoint. Any county maps would, of course, be helpful.

"Estimated completion dates of freeway improvements should be obtainable from the Metropolitan Planning Commission by phone.

"Good luck."

* * *

259. On December 22, 1959, Darmstadter wrote a memorandum to John Marshall entitled "Field Notes" as follows:

"*Site*

"The proposed site is located on the northwest corner of Bishop Road (Rte. 84) and Chardon Road (Rte. 6). Part of the property borders the Lake County and Cuyahoga County line. The property originally contained 170 acres, however, 40 have been sold to the State Highway Department for the planned Expressway spur. The property is relatively clear with a few slopes. I wouldn't anticipate any development problems except for some grading. Mr. Petti indicated to me that engineering tests have been made of the property and proved positive, in fact, he indicated that the soil conditions were excellent.

"The area directly around the site (1 block radius) presently has a few scattered houses. Directly across the highway on Route 6, at the county line, is a site where a 50-bed hospital will be constructed.

"*Access*

"Access to the site may be considered excellent. The property will have frontage on four highways. Euclid Avenue (Rte. 20) is a major six-lane artery which runs east to west. Route 84 and Route 6 are two-lane arteries which may have to be widened if the proposed center is developed due to the additional traffic. The Expressway will touch the property as indicated on the preliminary site plans obtained from Mr. Petti. According to Mr. Spillberg of the Ohio State Highway Department, a cloverleaf is planned at Highway 84. The site plans only indicate two ramps (on the west side of Highway 84); however, recent pressure applied upon the Highway Department by the residents of Willoughby Hills has brought about a change to a four-ramp cloverleaf. Mr. Spillberg informed me that this revised cloverleaf has not been approved by the Federal Government; however, they are proceeding in their plans under the assumption that this addition will be made. He indicated to me also that if the necessary funds are raised he would estimate that the Expressway spur would be open to traffic by the end of 1962.

"The Industrial Belt, which is tremendous and contains some of the leading industries in the nation, lies in the lowlands between Euclid Avenue and Lakeland Boulevard. North to south access is difficult from Route 20, therefore, it is my opinion that the primary zone should be confined to Euclid Avenue for this Industrial Belt forms a definite barrier. Also there is a relatively low density residential area between these two arteries.

"*Population and Income*

"Population data was obtained from the Lake and Geauga County Planning Commissions and seems to be fairly complete. The information from Lake County was based on school enrollment while the Geauga County population data is based upon the 1950 census and estimates by outside consultants who are connected with the Cleveland Plan-

ning Commission. I would be a little skeptical about using the population projections of Geauga County for they seem to be quite optimistic. Comparisons should be made with the population data obtained from the Cleveland Illuminating Company. At this point I would like to call your attention to the excellent land use map in the comprehensive plans that I obtained from the Lake County Planning Commission.

"As mentioned previously, population directly around the site is not particularly dense, however, it becomes extremely dense to the south (1 mile) particularly in the area around Lyndhurst. Homes in this area range from 24,000 to $34,000 and some go as high as $50.000. To the east, Wickliffe and Willoughby are older residential areas and it is my opinion that incomes would not be as high as compared to the southern portion of the trade area. There are some new homes being constructed in this area which sell for approximately $20,000. The high income areas are below Mayfield Avenue and homes range anywhere from $45,000 to $100,000.

"The population is not as dense in this area since the homes are on three-quarter and one acre tracts of land.

"*Competition*

"I obtained *all* competition from 200th Street to Highway 306 (west-east) and from the Lake to Mayfield Avenue (north-south). GAF competition was obtained from other areas throughout the estimated trade area. Competition is not particularly significant in the primary zone. There are few convenience centers in this zone located along Euclid Avenue. Department stores are located in the Center Shore, Southgate, and Eastgate shopping centers. The business district of Painesville has two junior department stores and a Sears' unit which primarily carries hard lines. Despite the lack of off-street parking facilities, this business area was quite busy. This possibly may be attrib-

uted to the fact that Painesville is the Lake County seat.

"Locations indicated in the field notes were checked. The only additions were in the Southgate Shopping Center. I also visited the Golden Gate shopping plaza, an intermediate center, which has recently been developed. I visited this center on two occasions and each time there was very little traffic. This center has additional land for expansion, however, it is doubtful if a department store would locate here since the Eastgate shopping center is located approximately one-half mile east and is presently constructing a new Bailey unit. The Mayland shopping center is a very old center and has a number of vacant stores. It primarily contains convenience type facilities.

"I think I covered the high spots of my field trip in this memo. If there should be any questions, I would be glad to get together anytime that it is convenient to you and that I am in the office, we can get it thrashed out. If necessary, I will dictate another memo with the information on it so that you can have it in your hand whenever you feel that you need it."

260. On December 22, 1959, the Higbee Company entered into a 25-year lease with Severance Estate, Inc., for a branch store at Severance. On December 23, 1959, Halle Bros. Company entered into a 25-year lease with Severance Estate, Inc., for a branch store at Severance. The terms of these leases were agreed to a "considerable time" before the signing.

* * *

263. The Cleveland newspapers carried extensive articles on December 29th, 30th and 31st, 1959, announcing that The Halle Bros. Company and The Higbee Company had signed leases for the occupation of branch stores at Severance Shopping Center. . . .

* * *

264. On January 4, 1960, Treiger wrote a memorandum as follows:

> "I spoke to Mr. Petti about the situation, specifically, the nature of our findings being negative with respect to both a regional and intermediate center, and suggested that we send him a memorandum explaining our conclusions and leaving it up to him whether he wanted us to finish the report or not. He said that that would be fine, although he was somewhat disappointed."

265. On January 8, 1960, Smith mailed to Hilltop a written memorandum entitled "Shopping Center Opportunities at Nutwood Farms."

266. On January 13, 1960, Harry Ratner offered, through Hilltop, to pay the owners $3,500.00 an acre for Nutwood.

267. On January 18, 1960, Mr. Treiger came to Cleveland and met with Mr. Petti and Mr. O'Neill. He wrote a memorandum on the meeting, which read as follows:

> "I spent the afternoon with Hank Petti and a group of his associates, in connection with the Nutwood Farm analysis in Lyndhurst. They accepted our conclusions with respect to a negative potential for regional intermediate or neighborhood shopping centers.
>
> "They are now contemplating a plan development of the total program on a recreational semi-institutional basis. He had a very rough schematic for ground use laid out showing the motel near the interchange, a couple of restaurants, a bowling alley (Brunswick people have indicated to him their interest in a 40 alley setup), a nine hole golf course (he found that the investment of 10,000 per hole quite possibly could be paid in three to four years, so that in time you could afford to tear out the golf course and put in more intensive use), swimming club, with cabanas, ice skating rink, etc. We drove around for quite a while looking at other develop-

ments in other parts of the Cleveland Metropolitan area. I told them that I thought that the idea made a lot of sense, for the property, but that he had to be prepared for the fact that the patience that would be required could possibly be even more than that required for a shopping center, and that the whole thing hinged on promotional aspect and the luck of getting started with the right couple of major deals, and that these would be keyed to promotion, rather than analyzed potential such as would be the case with a department store or supermarket.

"The meeting went very well, and I think that there may be some further work for us in connection with these other developments at another time."

268. A memorandum entitled "Investment Activities" dated January 20, 1960, of the Winmar Office, Seattle, indicated that those present were Messrs. Orrico, Arpke and McConnachie, and that:

"The meeting was for the purpose of discussing various points raised by Larry in phone conversations with Mac the last two days, specifically to arrive at an agreement on our attitude on the Bay Shore transaction and what we should do in the next meeting with Gilmore on the Cleveland deal. The following is a summary of the points in Mac's conversations with Larry which he reviewed for the benefit of the partners.

"...

"3. Cleveland—Larry feels we are morally committed and that it would be injurious to our reputation if we either withdrew or failed to perform. He believes we can withdraw, but in that case he would have to change his approach. He believes personally that we should do the deal and that we can perform if we decide that we want to do so. In the Board meeting with Austin's last July we agreed to provide management when the deal

was resolved. We are already committed to that, and they think the deal is resolved.

"Larry understood from Ake [Orndahl] that Frank [Orrico] thinks we should revert the deal to Austin's for the next 90 days and take an option position....

* * *

"Fred [Arpke] stated that he doesn't want to be in the deal whether we take it or not because

1. It apparently is an impossible schedule.
2. He thinks it involves a financing responsibility which no one would even try to accomplish.
3. He thinks Austin are being completely unreasonable on the architectural problem and he doesn't want to be obligated to put out that kind of money. The logical arrangement would be for them to contribute at least that much which would represent the major out-of-pocket cost to us.
4. We could provide the management if it was a good deal otherwise. He doesn't think we could handle the architectural costs involved.
5. The document is so tightly worded that he would be afraid of it and all the protection runs in Austin's favor."

269. A memorandum from the Smith file dated January 20, 1960, entitled "NOTES OF DISCUSSION RE: SEVERANCE CENTER, CLEVELAND" reads:

"This is a memorandum which represents the attitude expressed by Frank and Fred in a meeting with Mac and Hilde this morning concerning what the company should do in pursuing the situation in Cleveland.

"Against the background of a memorandum which Frank prepared concerning the four basic problems that appear to exist in Cleveland and the program for specific action over the next 90 days, it is felt that the specific program for action

should be adopted and followed through, but with particular emphasis on attempting to minimize the cash exposure for expenses during the next 90 days, but that the maximum effort should be exerted towards attempting to locate a financial partner. If at the end of 60 days it is apparent that no such partner is available, a statement should be made to the Austin Company for whatever reasons appear appropriate, and these reasons could be the four set out in Frank's memorandum, that to date we have not been able to find such a partner and that we will do one of two things. One would be to notify them that we intend to turn the property back to them due to the inability to finance or, second, to continue with our development effort, but at their expense, and continue on their behalf to attempt to find a developer.

"The assumption of having to step down because of lack of financing, or alternately to continue to operate at Austin's expense, assumes that it would be impossible to renegotiate the terms of the agreement which currently exist with Austin Company. It may be possible, with a modification of the time schedule and the architectural considerations, that there might be more justification for our proceeding at our own expense."

270. On January 20, 1960, Mr. Petti wrote Mr. O'Neill as follows:

"We have given considerable thought to alternative uses for Nutwood and the possibility of becoming participants in some sort of a land use plan.

"Since our meeting of Monday at the airport with Mr. Treiger of Larry Smith & Company, I have made several inquiries on the possibility of some land users joining with us in forming a syndicate. It seems that their interest in participation is advanced with reservations when faced with the necessity of making definite commitments.

"They express misgivings about the rezoning; the political complexities regarding utilities; as to

if and when the spur becomes a reality; how long will they have to hold the property; how much of it can actually be put to use now; who puts up the working capital.

"It must be recognized that their concerns are basic and real, although these problems could probably be resolved over an extended period. However, in view of the above, we believe that we actually have no definite alternative that we can talk about at this time.

"We recommend that the offer to purchase, as submitted by Harry Ratner, be given strong consideration.

"However, we do believe that the deal can be strengthened, and are submitting some changes for a counter offer which we feel we might be able to persuade the purchasers to accept.

"*Suggested Changes*

(1) Ernest money increased from $45,000. to $75,000.

(2) Additional down deposit increased from $100,000. to $120,000.

(3) Time limit reduced from 18 months to 12 months.

"For the initial down deposit of $195,000, as in 1 and 2 above, only land that is purchased by the state of Ohio shall be released.

(4) Release amounts increased from $4,500. to $7,000. per acre, pertaining to Chardon Road frontage and inside land only.

(5) Bishop Road frontage to a depth of 400 feet to be released on the basis of $150.00 per front foot.

(6) The balance of $400,000. to be paid in annual installments of not less than $100,000. each with 6% interest per annum.

"For each principal payment made, land shall be released as per items 4 and 5 above.

"We still are of the firm belief that time will increase the value of this property, but whether the time, effort, and capital expended, not to mention risk involved, is commensurate to the return, leaves us with the feeling that we are playing with a highly speculative venture, particularly as far as the present owners are concerned.

"It seems to us that the Ratners, whether we like to admit it or not, are probably one of the few who not only can resolve the political complexities, but also can work in greater harmony with the Telshe Yeshiva College people in dispelling damage claims regarding loss of road right-of-way from Euclid Avenue. This, as you no doubt know, could become a pretty thorny issue.

"Time and timing in a real estate deal are always important. At present, the Ratners' interests in this transaction seems to be high. We therefore suggest that it is to our mutual advantage to move toward the consummation of this deal with the least possible delay."

271. On January 20, 1960, Messrs. Orrico and Arpke met with Ian McConnachie in Seattle. Orrico and Arpke expressed reservations as to whether the Smith Company should proceed with the Smith-Austin agreement on the terms proposed by Austin. . . .

* * *

273. On January 22, 1960 Mr. O'Neill wrote to Mrs. Ashcraft and Mrs. Powell. Part of the letter was as follows:

"You already have received the planning map made by Knight for Hilltop Realty Company. The Hilltop Realty Company has obtained from Frank A. Thomas & Associates, civil engineers, the report as to the availability of sewer and water services which was one of the things to be provided by Hill-

top as a part of the consideration for their authorization to represent you. They have also obtained from Larry Smith & Company of Washington, D.C. a preliminary report as to the suitability of the Nutwood site for a regional shopping center development.

"Smith's conclusion is that, because of competitive conditions, the site is not suitable for such development as a regional shopping center, or for an intermediate shopping center. The report is not complete but it indicates that a completion of the report would merely include a lot of statistical data in support of the negative conclusions reached in the tentative report.

"Mr. Treiger of the Larry Smith organiaztion was here on Monday of this week and, with the Hilltop representatives, I rode around with them on a survey of other areas which might be thought to be comparable in some ways with Nutwood. One of the purposes of this survey was to consider whether, as an alternative to a regional or intermediate shopping center, the site might profitably be developed for a different type of use, namely

(1) For a motel, restaurant and filling station to serve the traffic which in considerable part might be expected to be developed by the Euclid Spur exchanges at Euclid Avenue and Bishop Roads;

(2) Approximately 20 acres for garden type apartments which might be expected to serve at least in large measure junior executives connected with the various industrial plants in the area;

(3) A health and hobby type of institution for elderly people who were ambulatory and might wish to live in an area in which they could get physiotherapy treatments, plat on a pitch and putt type of golf course and enjoy the outdoor surroundings;

(4) A bowling alley development. At this point Mr. Petti said that the Brunswick Balke Col-

lander people think they could profitably operate 45 lanes.

(5) A skating rink and swimming pool area .

(6) An open air theatre.

"This scheme contemplated that about 60 acres of the land at the corner of Chardon Road and Bishop Road would be reserved for the development of a shopping center when there was a demand for it, with the idea that in the meantime this reserved area might be devoted on a temporary basis to some kind of entertainment. Treiger seemed to think that there was enough merit in the idea that it warranted further study and it was understood that the Hilltop people would outline a program which they would submit to Treiger for his consideration and later submit to us.

"You should know that after four years of legislating, litigating and talking the Higbee and Halle people have definitely announced their commitment to lease portions of the Severance Milliken Longwood property at Taylor Road for a major shopping center development. There are also under consideration now at least three other large shopping center developments—two by the Ratner and Visconsi interests at Cedar & Richmond Roads and at Shaker Blvd. & Green Road, and one by DeBartolo at Mentor, Ohio.

"It became evident in the course of our discussion that if the May Company had not gotten the jump on the Halle and Higbee Companies with its 325,000 sq. ft. development in the shopping center at Cedar and Warrensville Center Roads, the Higbee and Halle people might have gone further out than the Longwood site. But the opinion seems to be now that with so many competitive developments pending, no responsible developer could be gotten to go forward with a large shopping center development at Nutwood.

"In the face of all this, Mr. Petti has come up with a proposal from Albert Ratner to purchase

Nutwood for $595,000. The terms proposed are entirely unsatisfactory but Petti seems to think that the Ratners would meet our terms. They proposed $45,000. when the agreement was signed, another $100,000. when the papers are put in escrow, either after the State of Ohio acquired the land for the Spur or at least within 18 months—the balance of $450,000. in annual installments over a period of 6 years with interest at 6%—no interest to be paid until the expiration of 18 months or the settlement with the State of Ohio for the Euclid Spur, whichever came first. There was also a 'sucker' proposal for a release scheme which would enable them to impair the security. I think that the Ratners are induced to make the offer in order to take the property out of the market for sale to any other developers, with the idea that the ownership of it will help them to develop their large residential holdings in the area and also help in their trading on the proposed ventures at Cedar & Richmond and Shaker & Green Roads, not to mention others in which they may be interested. The Ratners are probably the largest property developers and owners in the whole area.

"Under their proposal the Ratners would take the property subject to the easements which the College of Telshe has, and with the benefit of whatever obligations the College of Telshe has to help work out a drainage and street improvement system to get out to Euclid Avenue. Of course all of these plans for easements and roads out to Euclid Avenue were made before the Euclid Spur project was developed. The Spur will eliminate all the easements and the Ratners would have to work out with the College of Telshe and the College, as well as the Ratners, would have to work out with the State of Ohio the question of what compensation and damages the State would pay for the land it takes for the Spur project. Of course the State will claim that the project doesn't damage the rest of the property but benefits it.

"Petti seems to think that a plan for development might be worked out not involving immediately a shopping center and that a syndicate might be formed in which you would be willing to have a participation, which would take the property over subject to giving you, if not a prior claim for the price of the land, at least a large share of the partnership ownership of the site—the other partners to pay for their shares by putting up the capital needed to get the project to the point where sales or long time leases could be made to ultimate users. My own opinion is that it would be a hazardous thing for you to take a minority interest in any syndicate. There are too many chances for your partners to develop conflicting interests on which they would pyramid profits that would be charged against the costs of the partnership in which you would be sharing.

"I don't think you want to go into the real estate development business and I doubt that anybody can watch all the inside deals that could be involved to see that you would not get trimmed on any such deal. I would much rather see you sell the property and employ the proceeds in a manner which you could control. I say this notwithstanding the fact that a sale at $595,000. would involve you in a capital gains tax of $110,000. to $120,000. Your cost on the property is less than $70,000. But even after this tax you would come out with a net profit of about $350,000. plus the recovery of your $70,000. cost basis. This looks pretty good as compared with the prices at which the Ratners and their various fronts tried to get us to sell the property. The highest offer was $250,000. and the highest suggested was less than $350,000. gross. The Ratners will probably want an answer pretty soon on their proposal but they must expect that you will take time to consider it as against alternative methods of dealing with the property. I am writing you now merely to bring you up to date and in the hope that you will indicate to me for my guidance in negotiations whether you want to consider at all taking

any kind of a partnership interest in a development scheme as against an outright sale of the property. I have already indicated that my judgment is against your going into a real estate speculation, even though the profits available might seem very large. There are too many hidden factors including the possibility that this spendthrift economy of ours may get an awful jolt in the next few years. My own feeling is that the time to sell is when the gamblers are buying.

"You will remember the complicated scheme which the Richard Hawley Cutting-Lehman interest submitted for developing the property which would leave you in the position of trying to find your equity in the midst of their very elusive program. You may expect a similar problem on any deal for a partnership or equity interest with a developer. Before anything is sold, or leased to anybody, the developer has to work out and pay for water, sewer and roadway schemes and he has to be sure that the way he allocates space to each participant in the development avoids damaging the rest of the property. This may not be easy if the development is done piecemeal.

"Since dictating the foregoing, I have received from Hilltop Realty a letter dated January 20, 1960, copies of which are enclosed for each of you. This letter seems pretty strongly to confirm the views previously expressed herein.

"I would reduce the initial down payment to slightly under 30% of the sale price and have the balance payable in installments over four years so as to spread your profits over the 5-year period. While this would not reduce your tax, it would enable to you to offset these profits against losses on other investments, if you should happen to have bad years.

"I think each of you should let me have your views at the earliest possible date."

* * *

277. On January 26, 1960, Larry Smith wrote Gilmore of Austin a letter which reads:

"Before proceeding any further with the negotiation for the Severance Estate, we would like to be certain that the basic concept on which we have been working is in accordance with your ideas. There have been certain developments in our conversations with you during the last 60 days which have raised a question in our mind, such as:

(a) The fact that plans and specifications are not settled for the department stores.

(b) Your suggestion that the architect should operate under your direction.

(c) Your suggestion that there should be a penalty payment of $250,000.

"When we started to discuss this situation in May or June, I pointed out that the price which you were discussing could only be contemplated by a developer who had ample opportunity to eliminate the various contingencies at his own expense.

"The fundamental contingencies were these:

(a) The ability to finance in view of the high price of the land, the changing financing market and the inherent difficulties in shopping center financing.

(b) The very real difficulties of operating on a cost-plus designated contractor basis, which to our knowledge has not been undertaken in shopping center construction.

(c) The necessities of operating within your approval until completion of payment was assured.

(d) The relatively tight timing schedule which we were proposing in order to avoid the unsatisfactory nature of a wide-open timing schedule from your standpoint.

(e) The problems of the department store leases, especially the negotiation of plans and specifications which, in our opinion, are not yet satisfactorily solved in the light of present experience in shopping centers.

"We understood that your basic interest was in a maximum price for the land and the retention of the building contracts.

"We therefore agreed to use our best efforts to work a transaction out on that basis and we have great confidence in our ability to do so. We have been disappointed in the reaction of some of our ordinary financial associates to the cost-plus deal for construction and we have also had criticism of the short timing and the form of the department store leases. We do believe, however, in the value of the property and are prepared to undertake it, recognizing that our reputation is at risk, plus whatever investment we would make, which is already reaching substantial figures.

"However, the $250,000 penalty in itself is extremely disturbing to us because it suggests an intent on your part to treat this as a firm contract rather than a good faith attempt, using our own resources and those of our associates to work out a very difficult development problem for the joint benefit of Austin and ourselves.

"Quite frankly, we do not know of any developer who would undertake this project on a contract basis on the terms suggested in our arrangement with you. The stipulations of the zoning; the conditions of the department store leases; the timing problem, having in mind the fact that the plans and specifications must still be worked out with the department store; the tremendous financing problems involved in the Austin building contract; the limitations imposed by meeting your approval as the job goes through, plus the condition that the architect should be responsible to you—all of those conditions are onerous and in our opinion would prevent any experienced developer undertaking the

job without substantial modification of the contract terms—however, on the assumption that the deal in effect is an option, kept alive by performance and investment, by intelligent and competent developers, the deal is practical and we believe capable of accomplishment.

"If, however, your present suggestions indicate that you regard this as a contract with penalties for nonperformance rather than a working option for development purposes, we would prefer to step out of the deal."

278. On January 28, 1960, Petti wrote to Edward J. DeBartolo as follows:

"Needless to say, that I am disappointed in not having received any proposal from you relative to the purchase of Nutwood Farm, however, that is not the prime purpose of this letter.

"Sometime in late November, Clem Smeal authorized me to proceed with a sewer design study for the area in and around the Nutwood site. The results of this study plus a utilities plot map are now in my possession. Are you still interested in availing yourself of this information? The cost to you as per signature of W. C. Smeal, is two hundred dollars ($200.00).

"I also have at this time a very interesting study analysis by Larry Smith and Company on the subject property and the trading area surrounding it. It recites the Highway Department's plans for a four-ramp cloverleaf at the point where the Euclid spur crosses Bishop Road (Route 84), and the fact that the Highway Department estimates that the spur connecting the North-South Freeway with the Lakeland Expressway, will be open to traffic by the end of 1962. This pertinent information is only part of a very enlightening study, if you are interested, this too, can be made available to you.

"Ed, I am of the firm belief that all the data that we have on Nutwood, strongly suggests that the time is here for someone to act, in order to capitalize on an opportunity, while it is still available."

* * *

280. On February 10, 1960 Laurence P. Smith, Frederick C. Arpke and Frank A. Orrico, who were the sole co-partners doing business as Larry Smith & Company, executed an agreement whereby Austin agreed to sell all of the stock of Severance Estate, Inc., an Ohio corporation, to Smith on stated terms and conditions. Severance Estate, Inc. was the owner of the 150-acre site which later became the Severance Center and the adjacent land. The agreement was terminable by Smith in the event it considered itself unable to proceed. The agreement provided that the capital stock of Severance Estate, Inc. be transferred to Smith but that it be endorsed in blank and returned to be held by The Austin Company as security until it was determined whether Smith was able to arrange financing and other preliminaries necessary to development. The price was $4,000,000, and Smith also agreed to deed twenty acres of the adjacent property back to Austin and to give Austin the exclusive right to be the engineer, architect and construction contractor for Severance Center and in the adjacent land. These terms which were finally settled were substantially the same as those agreed to between Smith and Austin by September 1, 1959.

* * *

286. On February 16, 1960, Treiger wrote a memorandum in part as follows:

> "With the Austin Company, we spoke of the desirability, at this point, of *announcing* at least to the Higbee and Halle Companies, *Larry Smith & Company's participation* in the ownership. At that point, it would be obvious to the stores that we had not rested during the past two months but had been extremely active both by way of the purchase agreement and the work that we authorized on our own with Gruen, for example. We tried to get ahold of Larry to clear this, but could not during the course of the day so we consequently let the matter pass. . . ."

* * *

288. On February 20, 1960, Larry Smith wrote Gilmore of Austin a letter which reads in part:

> "I had intended to speak to you about the question of an announcement, although it had been my expectation that it might be postponed until a later date because we had discussed with you the concept of our representing that they were acting for the Severance Company still under the ownership of Austin's—and, as a matter of fact, it is expressed in that fashion in the documents.
>
> "However, as you possibly know, the transaction is currently known 'in the streets.' This is a thing that always disturbs us because I do honestly believe that we are very strict in our maintenance of a matter that is expressed as being confidential even under circumstances where we think that there may be difficulty in keeping it so. However, it is difficult for us to deny sometimes when we are faced with a direct statement by somebody on the outside that they know that a certain condition exists—if, in fact, they know the statement to be correct.
>
> "Coming from the general to the specific—Bruce Hayden of the Connecticut General Life Insurance Company of Hartford, Connecticut, spoke to me in Pittsburgh the afternoon of the Eisenhower dinner when I had just left you in Cleveland. I ran into him unexpectedly at the meeting I proposed attending, and he asked me, out of a clear sky, whether we intended to talk to them about financing of the Severance property. There were three or four other people in the group and the way that his questioning was framed indicated that he knew that some negotiations were afoot. I therefore said that that question would be up to the Austin Company and that if they wished us to put the material in the Connecticut General's hands when they were ready for financing we would do so. Bruce then said that his people had been in touch with it for five years and thought it was a very interesting piece of financing and made the statement that the Austin Company had told them they were disposing

of their interest to us and that he was interested in whether we would be looking for financing beyond just the mortgage financing. Under the circumstances, I could not say that this was a total untruth. Subsequently, when the others had left, I told Bruce that you had discussed this with us but that there was nothing complete and we didn't know right at the minute what might result. I asked him in general what their interest was in such things, and said that even for your account you might be interested in a financial partner, and he suggested that we discuss it with them whenever we were free to do so.

". . .

". . . I am not in favor of any newspaper publicity to a matter of this kind, but I do think that a statement to Halle's and Higbee's that we have entered into a development contract with you by which it is contemplated that a group in which we have a substantial interest will acquire the property when you are satisfied that your intentions in connection with this development have been fulfilled, would be the best thing to do. This would be all that would be required for the time being. Any further discussion of this transaction could take place at a later date. It represents the actual fact at the minute and I think is as far as we should go."

* * *

290. On February 24, 1960, Mr. O'Neill wrote to Mrs. Powell [sic, Miss Winslow] as follows:

* * *

"I cabled you yesterday morning (February 23rd) as follows:

'Mildred Winslow
Hermosilla 13,
Madrid, Spain
Delay dangerous. Telephone immediately.
O'Neill'

* * *

"A week ago Wednesday, after I had been trying for two days to reach you, the Cleveland Press published a report that the Federal Bureau of Roads, which is expected to finance 90% of the freeway cost, including the Euclid spur, had issued an order that on federally financed roads there were to be no more traffic interchanges less than 2 miles apart. There are two traffic interchanges proposed to serve Nutwood—one at the Euclid Avenue end and one at Bishop Road. At the very beginning the State Highway people told us of the opposition of the federal government to a diamond traffic interchange at Bishop Road but, as the result of our efforts including a very effective plan of getting Willoughby Hills and Wickliffe, in their own interests, to take the initiative in seeking to persuade the federal and state authorities to install the 4-way interchange at Bishop Road, we had gotten a commitment from the State Highway Department to locate the interchange there and the enclosed clipping from the Cleveland Press shows this proposed interchange.

"The newspaper reports have indicated that while the new Bureau of Roads interchange rule is operative from January 1st of this year, it may not be enforced against interchanges already planned and where the property involved has been acquired and the contracts let before June 30th of this year. Four months is a short time in which to work out all the problems involved in acquiring the land for the Euclid spur, agreeing on compensation and damages and getting bids submitted and contracts let, and this whole operation will involve a great deal of hard and costly work.

"It seemed most urgent that we try to get a contract for the sale of the property with a substantial down payment completed before time runs against us on this new order. If the Bishop Road interchange were dropped, I would not be surprised to see a loss of $175,000 to $200,000 in the value of your property. There are all kinds of negotiations and manipulations involved in this situation of the

kind in which promoters like the Ratners are expert and some are of the kind in which neither you nor I would want to be engaged.

"I was astonished that your letter of February 19th indicated that you had not read my letter of January 22nd carefully and did not have it with you when you were writing to me. I have heard nothing from Petsey and I suppose your letter to to her will give rise to further delay.

"I think that you and Petsey should each write me, telling me that I am authorized to negotiate a firm contract for the sale of the property on terms which I consider proper for your security. In view of what has happened, I must have this kind of an authorization to reassure Mr. Petti and to make any progress in negotiations with the Ratners or anybody else.

"Furthermore and especially in view of the risk of losing the Bishop Road exchange, I should have your long distance telephone numbers and cable addresses, and you should be available for any necessary signatures, including deeds, without any more delays than is involved in mail transport.

"Please let us have no more delay.

"Kindest regards."

* * *

295. On March 4, 1960, Lambert & Company informed Smith that it was not interested in participating in the Severance project.

296. On March 7, 1960, Newman of Winmar, New York, wrote a memorandum which reads:

"Arrived in Cleveland mid-morning and went immediately to the hotel for a meeting and lunch with Paul Gilmore and Ham Beatty.

"We discussed, generally, how we would tell Higbee's and Halle's of our new role in the development of Severance.

"At 1:30 I went to a meeting at Higbees. This meeting was attended by Herb Strawbridge, Bob Wright, Paul Gilmore and Ham Beatty. At this meeting Paul Gilmore disclosed the fact that Larry Smith & Co. was taking over the development of Severance Center. Strawbridge and Wright seemed to have had an inkling of this, so the disclosure did not come as a complete surprise to them. Gilmore explained that the Austin Company would remain in the picture as engineers and contractors. . . ."

* * *

298. On March 11, 1960, Larry Smith wrote a memorandum as follows:

"I called Paul Gilmore on the phone at the suggestion of Ham Beatty and talked about publicity in connection with our contract with The Austin Company. I said that as far as we were concerned that we believed in having as little as possible and that I thought it would be 30 or 60 days before we would have our financial relationships sufficiently straightened out in England to justify any comment on that, so I said that having in mind the fact that it might be necessary for The Austin Company to release something in order to preserve their public relations in Cleveland that we would leave it to them to make the announcement in any form that they wished because we were satisfied to have the minimum announcement and to have it phrased in a way that would put The Austin Company in the best local relationship."

* * *

301. On April 29, 1960 Mrs. Ashcraft and Mrs. Powell accepted Harry Ratner's offer to purchase Nutwood for $3,500.00 an acre on the recommendation of Petti and O'Neill. The total acreage was 175.189 and the consideration was $613,161.00. Mr. Ratner nominated Ridge Hills Development Company, an Ohio corporation, to take title to the premises on his behalf. Ridge Hills, a corporation owned by Mr. Ratner and two asso-

ciates, Fred Stark (since deceased) and Leonard Fuchs, took title to Nutwood and is now the owner of the property, except for a portion which is now owned by Mr. Fuchs individually.

302. On April 29, 1960, Nutwood was zoned for residential use only, except for ten acres, fronting on Euclid Avenue, which were zoned for apartment use. These ten acres were a part of the property taken in January, 1961, by the State of Ohio for the location of the Euclid Spur and for approaches to and from said spur. The April 29, 1960 agreement for the sale to Ridge Hills Development Company contained no representations as to the zoning or conditions relating to rezoning of the property. Between September, 1963 and July, 1964 some portions of the Nutwood property not taken by the State of Ohio were rezoned as "Business," and "Multi-family."

303. Plaintiff Hilltop did not show the Smith analysis to the purchasers of Nutwood.

* * *

311. On July 21, 1960 a front-page article in the *Cleveland Plain Dealer* announced the start of the Severance Shopping Center and mentioned that Smith was owner and developer of the Center. The *Cleveland Press* of the same day stated that Smith would develop the Center which it "is purchasing" from Austin and that Winmar Realty Development Co. of New York and Seattle will be exclusive leasing agent and property manager. Another article in the *Cleveland Press* of July 22, 1960, stated:

> "Winmar will work for Larry Smith & Co. of Seattle."

* * *

313. On July 27, 1960 Wilbert J. O'Neill prepared a draft letter to be sent by plaintiff Hilltop to Smith,

inquiring about Smith's interest in Severance. This letter was sent to Smith by Petti on August 2, 1960. It read as follows:

> "Mr. O'Neill told me some time ago that the Austin Company had disposed of its proprietary interest in the Severance Millikin-Longwood development retaining only the design, engineering, and construction work. Now the Cleveland papers have announced that you have acquired control of the project. This is causing me real embarrassment with my clients. I understood, of course, at the beginning that you had made a survey of the Longwood site for the Higbee-Halle interests and that, if you found any conflict in giving me your appraisal and recommendations concerning the Nutwood site, you would so advise me, but I did not have in mind the acquisition of a proprietary interest by your company, which, of course, would produce a very serious conflict of interest in acting as adviser on the Nutwood project.
>
> "Not knowing of this change in your position and in reliance on your January 7, 1960, report and our subsequent discussions here in Cleveland with Mr. Treiger, I advised my clients on a sale of the property, which they have made in accordance with this advice. My diffienlty is further increased by the fact that our Regional Planning Commission has recently published a report indicating a substantial need for additional shopping center development in the vicinity of the Nutwood property.
>
> "I shall appreciate a full explanation of your position."

* * *

315. On August 9, 1960, Treiger prepared a memorandum captioned: Re: Letter of August 2 from Henry Petti—Lyndhurst, Ohio Nutwood Farms, stating:

> "This memorandum is intended to serve as the basis for a discussion with Mr. Petti in Cleveland on August 10, 1960, predicated upon his letter of August 2nd.

I. At the time of our undertaking the assignment late in 1959, I notified Mr. Petti of the fact that we were employed on a consulting relationship on a retainer basis with the Austin Company from the inception of the project's planning and that we were still actively working on the project. Mr. Petti authorized us to proceed against knowledge of that position.

At the time of our undertaking the analysis of Nutwood Farms, our only relationship to Severance Center was as a consultant.

Our responsibility to a client, particularly under a long-term consultant relationship, cannot be less than it would be to ourselves under a propriety interest. Consequently, the extent of a possible conflict of interest between alternate positions of consultant and/or owner would have absolutely no effect on our objectivity.

II. Mr. Petti's letter refers to the Regional Planning Commission's report which indicated 'a substantial need for additional shopping center development in the vicinity of the Nutwood property'—about 450,000 square feet in areas NE-1 and NE-2 through 1970. These recommendations must be interpreted in light of the concepts and qualifications within which they were developed. The Commission's analysis is based solely on a ratio of retail space to population (30 square feet of shopping and convenience goods store area in business centers for each family). The report states that this yardstick represents 'overall planning and must be critically employed for individual . . . trade areas and shopping locations . . . and we caution against permitting the ratio to be employed for a single shopping center.'

Our report does not suggest that there is no further need in the northeast Cleveland sub-

urbs for additional retail space. Rather, our report concludes that because of competitive factors, there is a *negative potential for* regional shopping center development.

This conclusion is entirely consistent with the finding and recommendation of the Regional Planning Commission. Our study was based upon the potential for department store and apparel categories within a regional shopping center complex, thus, representing a different circumstance from scattered retail development or numerous smaller retail centers and business districts. Smaller centers are essentially oriented for *convenience,* a feature which cannot be completely matched by the large one-stop regional center, and hence smaller projects can be justified and can operate successfully within the overall regional trading area served by the regional shopping center. (As a matter of fact, we noted that a sufficient potential did exist for a smaller center at Nutwood Farms.)

III. In a recent telephone conversation, Mr. Petti referred to knowledge that a leading department store and leading chains are interested in shopping center developments within the Nutwood Farm area. This comment suggests that our finding on absence of potential would be in error. There are inherent distinctions between retailers' and owners' objectives. Often, the department store finds it necessary or desirable to establish a branch location for strategic reasons *in spite of competition* (*i.e.,* to be represented in a market and to battle for a share of that market rather than foregoing it to competitors). The institutional objectives of the department store is not necessarily consistent with *investment* objectives of a landowner.

We know ourselves of at least one Cleveland department store interested in a new branch

substantially east of the Severance estate. We do not believe that there is a need for additional department store space in this particular suburban market and we further believe that the development contemplated would be relatively marginal in view of the competitive situation. However, in spite of our reasoning and conclusions, we are aware of the probability that this particular project will go ahead because of the store's conviction that such a move would benefit them.

A department store generally assumes that a volume of $50 per square foot is fairly satisfactory in the early years of a branch store's operation. A typical department store rent represents 3% of sales, or about $1.50 per foot on a $50 sales volume. A rent of even 15% in excess of this, for example, would be $1.72. In view of the fact that an 8% amortization on construction costs of say $16.00 per foot would represent $1.28 and taxes, insurance, maintenance, management and other overhead would represent another $.40 to $.50 per square foot of floor area, it can be seen that the 'costs' might run to at least $1.70 or more. Investment results are thus not overally optimistic from the owner's standpoint, even at levels regarded as satisfactory from the department store's standpoint.

Finally, it must be pointed out that *differences of opinion can exist* in connection with the same set of facts and our advice to you was developed on the basis of best efforts on our part on your behalf.

IV. Our Nutwood Farm analysis, in our opinion, was predicated upon very liberal allowances in all respects, since we wanted to be absolutely certain of our negative conclusions. The eastside of Cleveland is characterized by several extremely strong retail concentrations, particularly if we consider the soon to be de-

veloped Severance Center. Review of our report and of our summary letter today suggests a comparable conclusion to that expressed in the report."

316. On August 10, 1960, Treiger went to Cleveland and conferred with Messrs. Petti and O'Neill and stated Smith's position and left with them his written summary of August 9, 1960. He prepared a memorandum of the meeting as follows:

"I had dinner with Mr. Petti and Mr. O'Neal, the attorney for the family that originally owned the property at the time that we made the analysis. I had a memorandum which I had prepared and which had been typed by John Tierney's secretary in Cleveland, as the basis for the discussion. The substance of this memorandum, a copy of which I believe is in the files also, was as follows:

1. The responsibility to a client was no greater or less than to ourselves.

2. Our sole position at the time of our undertaking the work for Mr. Petti on the Severance Center was as a consultant.

3. Reflecting on the conclusions reached in our Nutwood Farm analysis at the present time, absolutely and 100% is confirmed at present.

"The situation from their standpoint is as follows: On the basis of our report they in turn recommended to the owners of the property to sell the estate. Subsequently, the new owners of the property are undertaking to get the property developed for regional shopping center purposes. Apparently there is very substantial interest on the part of some of the national tenants and, for that matter, one of the local department stores — I believe the May Company, knowing the way the May Co. is operated there in Cleveland I would say that the intent or possibility of interest might very well be well founded. Mr. O'Neal took the position that he was well informed of the fact that we had a consult-

ing responsibility to the Austin Company at the time that we undertook the work for them. However, under a condition of proprietary interest, the extent of the conflict of interest, and this is the important point, was greatly expanded, and we owed them an obligation to inform them of the fact that we were submitting our report under different circumstances than existed at the time that we undertook the work. It would then have been up to them to decide whether to accept our conclusions and our findings, or to seek other guidance in the matter, although they do not question the fact that they owed us the money and would have paid us in any event.

"I do not believe that they were satisfied as a result of the meeting, and it was left on the basis that we would get in touch again."

317. Smith did not, at any time before August 10 or 12, 1960, disclose to plaintiffs or Mr. O'Neill that Smith was negotiating to buy Severance from Austin or that it had bought Severance from Austin.

* * *

319. On September 17, 1960, plaintiff Hilltop wrote a letter to Treiger as follows:

"As you know, our clients have been disturbed as a result of the disclosures by our local newspapers of your company's acquisition of the Longwood properties. Unfortunately, our recent conference did not tend to alleviate this problem in any way.

"In order that we may properly explain the exact situation to our clients, it is requested that you furnish us with certain background information relating to the acquisition of the Longwood properties. We should appreciate your informing us generally as to the transactions concerning your company's acquisition of the Longwood properties and also advising us of the following: The dates when The Austin Company was first ready to dis-

pose of its interest in the Longwood site; the dates during which negotiations were carried on by your company and The Austin Company for the acquisition of the Longwood property; and the actual date on which your company acquired the proprietary interest in the Longwood property.

"Furthermore, the question has been posed to us as to whether under your retainer with The Austin Company regarding the Longwood site your company had any responsibility for the promotion of the project in connection with the conducting of leasing negotiations and obtaining tenants for the proposed development.

"Ray, I believe that since our firm has been your client in this matter, we are entitled to a more complete picture of the background transaction than has been given us to date in order that we may more adequately explain the situation to our clients. Certainly, it would seem that your company and our company share a common ground concerning our obligations to a client in the operation of our businesses, particularly, since it is necessary for both of us to preserve and enhance our reputations as competent and responsible business organizations.

"We trust that you will do all you can to clarify this situation, and shall appreciate your earliest reply."

There was no written reply to this letter; but there was a subsequent meeting on February 15, 1961, at which time the Review Memorandum (Ex. 10) was delivered to plaintiffs.

* * *

323. On October 20, 1960, General Counsel for plaintiff Hilltop wrote a letter to Smith as follows:

"Our office is General Counsel for Hilltop Realty, Inc., which has consulted us in connection with your market study of the Nutwood Farms Site. We have been advised that a possible conflict of interest existed in your dealings with Hilltop Realty, Inc.

and its clients as a result of your interest in the Longwood properties.

"I understand that recently Mr. Henry Petti, President of Hilltop Realty, Inc., has written to you requesting certain information in order that Hilltop Realty, Inc. and its clients may be aware of the exact situation concerning your activities and interest in the Longwood properties. Without further reiterating the remarks made in Mr. Petti's letter to you, it is requested that you send either Mr. Petti or our office the information requested in Mr. Petti's letter so that all parties will be apprised of the situation and can take whatever action is appropriate. A sufficient period of time has elapsed since Mr. Petti's letter to you and he has been under certain pressure from his clients, so that your earliest reply will be appreciated."

There was no written reply to this letter; but there was a subsequent meeting on February 15, 1961, at which time the Review Memorandum (Ex. 10) was delivered to plaintiff.

* * *

333. On February 15, 1961, defendants' attorneys in Cleveland called a meeting with Mr. O'Neill and Mr. Petti, and Mr. Zelman of the Cleveland firm that were and are Hilltop's General Counsel, at which time the "Review Memorandum" (Ex. 10) was given to plaintiff, without charge. The "Review Memorandum" was prepared by Smith and dated December 15, 1960. . . .

334. On April 27, 1961, Hilltop executed an agreement with The Ridge Hills Development Company giving Hilltop a one-year exclusive agency to find lessees or purchasers of the Nutwood property.

* * *

337. On June 14, 1961, Petti sent a Nutwood brochure to Mr. David May of The May Department Stores Company of Los Angeles advocating Nutwood as "an ex-

cellent location for a May Company store." Mr. Petti expressed his "firm belief that our location is a 'blue collar,' and a middle income area as compared to your Cedar-Center location which caters to people in a much higher income bracket. I see little conflict as each of the trading areas is distinct in itself." Petti enclosed a map which shows the trading area of Nutwood as competitive with neither the May Company's store at Cedar-Center nor Severance Center.

III. EXCERPTS FROM TRANSCRIPT OF TESTIMONY

A. Excerpts from Testimony Bearing on Issue of Intent to Deceive (Specification of Error No. 1)

JOHN W. MARSHALL, DIRECT EXAMINATION
BY MR. WHITE:

Q Would you state your name, please?

A John W. Marshall.

Q Where do you live?

A 9408 Columbia Boulevard, Silver Springs, Maryland.

Q By whom are you employed?

A The United States Department of Labor.

Q In what capacity?

A I'm an economist.

Q How long have you been employed by the federal government in that capacity?

A Approximately three years, sir.

Q Were you the economic analyst for the Larry Smith Company on the Nutwood Farms memorandum in 1959-1960?

A I was.

MR. WHITE: May the witness be shown Exhibit 176, please.

(The exhibit was placed before the witness.)

THE COURT: Let's all keep our voices up.

Q (By MR. WHITE) Do you recognize that file?

A I do.

Q What is it?

A This is a listing of the effective competition to the Nutwood Farms trade area.

Q In whose handwriting are the sheets which show the percentages applied to determine effective competition?

A My own.

Q What factors did you take into consideration in determining the percentages of effective competition to be applied to Nutwood?

A The distance from the Nutwood Farms site, the size of the competing facility and the strength of the competing facility—

THE COURT: You say size of the competing facilities?

A Facility, sir. I'm speaking in the singular in each case.

THE COURT: I see, as to each one.

A Yes, sir. And the strength based on whether it was a nationally known chain or a regional chain.

Q (By MR. WHITE) What techniques or procedures did you use in determining the percentages to be applied?

A In most cases where there was strength of any kind, again with a sizable department store, I would

sketch trade areas in the rough on a piece of plastic with a grease pencil and see how far the arcs of these trade areas as estimated for a competing facility cut into the Nutwood trade area.

Q Was the methodology you used in working up the effective competition for Nutwood the same or different from other studies you worked on?

A It was the same.

Q Did you encounter any unusual problems in working up the effective competition for Nutwood?

A No, sir.

Q Did the effective competition percentages shown in Exhibit 176 represent your professional judgment as to the proper percentages to be applied?

A They did.

Q Did anyone in the Smith organization attempt to interfere with your exercise of that judgment?

A No, sir. Some modification of them came about as a result of review conferences, but these were very minor in all cases. This is a very usual technique.

THE COURT: Did anyone outside the Smith organization attempt to influence you?

A No, your Honor.

Q (By MR. WHITE) Did any of your superiors attempt to interfere with any of the judgments you made in writing Exhibit 29?

A I'll have to answer that in this way: When an economic analyst presents a report of this kind to their superior, which would be an account man, it is always subject to review by the report writer and the account man. This usually is perhaps language

or some particular item in a given area where the account man has familiarity but the report man does not.

Q To what extent can you remember reviewing the effective competition of Nutwood with Mr. Treiger?

A Well, this was reviewed, as I have stated, as a matter of course. The entire report would be reviewed.

Q What if any suggestions can you remember Mr. Treiger making in your review with him of the Nutwood memorandum?

A Two things come to my mind. One, the expenditure pattern on a per capita basis was altered in several cases. This was a give and take where one may have been lowered slightly and another store category raised slightly. Total expenditures for retail goods remained at the same level for each zone.

Another case, as I mentioned previously, was the slight modification in effectiveness of a given location. This might have been modified very slightly. I believe in the few cases where this was done they tended to go down rather than up, but perhaps I was a little more fearful of competition than Mr. Treiger was.

Q Can you give the Court an illustration of what you meant by adjusting the—was it per capita expenditure pattern?

A Well, for example my estimate in a given zone may have been that the per capita expenditure for let's say hardware goods was $60 and for drugs perhaps $75. It may have been that Mr. Treiger suggested that these be modified so that hardware would be $55 and drugs would be compensated higher.

Q To what extent can you remember reviewing the Nut-

wood memorandum with Mr. Imus before it was submitted to the client?

A Oh, I spent most of an afternoon with Mr. Imus. It was customary in the Larry Smith office to have two senior people review all economic reports. It had been reviewed by Mr. Treiger and myself, and this was the second review.

Q Can you remember any particular subjects which you reviewed with Mr. Imus?

A Mr. Imus' review dealt mainly with techniques, magnitudes of numbers and their relationship. (Tr. 1667-71)

* * *

Q When did you first learn that Larry Smith & Company was considering the purchase of an interest in Severance property?

A The best period in time that I could give you in that would be in the early summer.

Q Of what year?

A 1960, sir. (Tr. 1678)

THOMAS PAUL DARMSTADTER, DIRECT EXAMINATION
By MR. WHITE:

Q Would you please state your name and spell your last name?

A Thomas Paul Darmstadter, spelled D-a-r-m-s-t-a-d-t-e-r.

Q Where do you reside?

A 5905 Bullard Drive, Austin, Texas.

Q What is your occupation?

A Real estate developer.

Q With what company are you associated?

A The Lumbermen's Company.

Q Of what city?

A Austin, Texas.

Q What is your position with the Lumbermen's Company?

A I'm vice president in charge of their Property Management Division.

Q What are your duties in this connection?

A Well, I look after the operations of their high rise apartments and also merchandise new projects.

Q In what area does the Lumbermen's Company operate?

A A national basis.

Q Did you do the field work on the Nutwood Farms study?

A I did.

Q Briefly would you describe the field trip you took to Cleveland as best you can remember it?

A I arrived in Cleveland on a Sunday evening, checked into my hotel, which was on an outlying portion of the Cleveland area close to Nutwood Farms. The next morning I called Mr. Petti's office and went by his office to introduce myself and tell him exactly what I was in the metropolitan area to do. We agreed to meet for lunch that afternoon.

After leaving Mr. Petti's office I proceeded to update the competition or the field sheets that I previously had from other studies and to obtain additional competition in the immediate area of the site. I also proceeded to contact various planning agen-

cies, local, county and federal, as well as the Highway Department and other private agencies in connection with obtaining information which would be utilized for writing the report.

The next day I proceeded to obtain competition on the outlying areas, that is, the two counties up along the lake as well as update the competition which I previously had, and also contact additional agencies with regard to economic data.

Q About how many such agencies did you contact?

A I would say in the neighborhood of fifteen — well, agencies, when I say agencies I mean private as well as public, about fifteen sources.

Q Did you encounter any unusual problems in doing your field work?

A No. (Tr. 1712-13A)

* * *

Q (By Mr. White) Drawing your attention to Exhibit 175, the top sheets on the right-hand side, is that the field—I'll wait until you have it. Mr. Darmstadter. (Exhibit No. 175 was placed before the witness.)

Q Are those the field notes which you submitted to Mr. Marshall of your trip to Cleveland you have just described for us?

A Yes, sir. (Tr. 1714-15)

* * *

Q Well, referring to your field notes and to these work sheets in Exhibit 82, do they represent your best judgment as to the conditions which you found in the field?

A Yes, sir.

Q Did any of your superiors in the Smith Company at-

tempt to interfere with your exercise of judgment in any phase of the work you did on the report?

A No.

Q Did anyone else?

A No.

Q When did you first learn that Larry Smith & Company was considering the purchase of an interest in the Severance property?

A The exact timing I do not recall, but I would say it was at least one year after we submitted the report to Hilltop Realty. (Tr. 1718)

TOM M. CRUME, DIRECT EXAMINATION

* * *

Q Mr. Crume, I think when we recessed yesterday you had just described that when Mr. Treiger arrived in October 1959 you took a ride around the Nutwood property and its environs and returned to the Hilltop office.

A That is correct, sir.

Q Now, during that ride was there any period of time, if you recall, when you were alone with Mr. Treiger?

A Well, as I testified during my deposition, when we made the stop at the Mount St. Joseph Home For The Aged Mr. O'Neill got out of the car and at the time of the deposition I wasn't sure whether Mr. Petti was also out of the car, but I have determined since that time that he was, so—

Q Do you know the occasion for their getting out of the car?

A Well, it was a question of acquiring some fill dirt for the property, and Mr. O'Neill was seeking Mr. Petti's assistance in obtaining it.

Q Did they walk over to that area?

A Yes, sir, that's right.

Q Now, during this period of time did Mr. Treiger make any statement to you concerning the nature of his relationship with Austin and Severance?

THE COURT: Which time? Do you mean after O'Neill and Petti left or before?

MR. STEPHAN: When Petti and O'Neill had left and he was alone with Mr. Crume.

A Well, I can't say definitely that the remark was made while Mr. O'Neill and Mr. Petti were out of the car, but since neither of them remember hearing it I would think that that's the time that he made his remark to me.

Q (By MR. STEPHAN) In any event, what remark did he make as nearly as you can recall?

A In effect he says, "You know we have made the studies on Severance," and of course I did know, and he added, "And we are also"—or, "We are still consultants." (Tr. 479-80)

B. Excerpts from Testimony Bearing on Issue of Materiality (Specification of Error No. 1)

HENRY PETTI, CROSS-EXAMINATION

* * *

Q At the time you hired Larry Smith & Company wasn't it your thinking that Nutwood was in an entirely different trading area from Severance?

* * *

A I might answer it this way: I don't think it was an entirely different trading area, but it was a distinct trading area. The trading areas were quite distinct.

One was in a working class area and middle income class, whereas Nutwood was in what I called the carriage trade area, and I thought they were distinct, yes.

* * *

Q (By Mr. White) Mr. Petti, if I may, on that last, did you misspeak yourself?

A Yes, I meant Severance. Longwood was in the carriage trade area. I'm sorry.

Q And Nutwood was in the working class area, is that correct?

A What we refer to as the blue collar or working class, middle income class, yes.

Q Would you refer to the Nutwood and Severance project sites as being in entirely different trade areas?

A No, I would not, because I don't think any trading areas are entirely within themselves. People come from many distances to go to different stores at different times. Although they are in the trading area, they are in an entirely different center.

Q As a matter of fact, wasn't it your opinion at that time when you hired Larry Smith & Company that Nutwood and Severance would be on each other's borders but that they were not in the same trading area?

A As far as the delineated physical trade area, yes, that was my thinking. I thought that they had just about reached each other and maybe slightly overlapped. That didn't mean that people from the Nutwood trading area would be precluded from shopping at Severance or vice versa.

Q But would it be fair to say that the two trading areas as such were distinct, in your opinion?

A That was my thinking, yes.

Q And that there was no substantial conflict between the two?

A That was what I believed. (Tr. 291-94)

* * *

Q (By Mr. White) Mr. Petti, do you remember on the occasion of my taking your deposition, and I will ask that your deposition be placed before you—(Depositions were handed to the witness.)

Q Will you kindly refer to Page 231, line 25 of your deposition.

A I've got Page 231.

* * *

Q (By Mr. White) Did I ask you then, so the record may be clear, on that occasion,

> "Q It was your opinion that Severance was not within the Nutwood trade area, is that correct?"

And you answered,

> "A I would say there would be some overlap. We were definitely thinking only in terms of the City of Euclid, Wickliffe, Willoughby, Eastlake, Mentor, the south of the Nutwood site maybe to a distance of a couple of miles possibly. If we had the right tenants we could move into Mayfield Road, but nothing south. I felt that they were on each other's borders but they were not in the same trading area."

Did you give that answer to my question that occasion?

A Yes, that's exactly the way the deposition reads.

Q And you told Mr. O'Neill of your views, did you not?

A I'm not sure that I told him, although it's possible in our discussion that I did.

Q Mr. Petti, on the occasion of taking your deposition at Page 232 starting line 10, did I ask you,

"Q Did you share all this with Mr. O'Neill?"

And your answer,

"A I think I did."

A That's exactly what my previous answer was.

Q To the best of your recollection did you share these views with Mr. O'Neill?

A My answer is the same, I think I did.

Q Did you also share your views with Mr. Crume?

A I believe I would have. (Tr. 320-22)

C. Excerpts from Testimony Bearing on Issue of Reliance (Specification of Error No. 1)

HENRY PETTI, DIRECT EXAMINATION

* * *

Q (By MR. STEPHAN) When you found in the report the conclusion that the potentials were negative as to a regional or intermediate shopping center, did you rely upon it?

MR. WHITE: Oh, I object to that, your Honor, on the grounds that I previously announced with respect to the testimony of Mrs. Ashcraft and Mrs. Powell. This is asking him the direct question that is one of the ultimate issues before the Court. He can certainly ask him what he did, what conversations he had with Mr. Treiger, but this question I'm sure is objectionable.

THE COURT: Well, you may be right. I am going to let him answer it, however.

THE WITNESS: Will you read the question back, please? I'm sorry.

THE COURT: The question was, did you rely on the report you received from Treiger.

A Yes, I did. (Tr. 234)

* * *

Q (By MR. STEPHAN) What did you do after receiving that report, or to whom did you talk?

A I talked pretty much to the associates in my own office, particularly Mr. Tom Crume, who had worked with me very closely on this, and immediately we began to think of other uses for the property, inasmuch as the regional shopping center had been ruled out. (Tr. 235)

* * *

Q (By MR. STEPHAN) As a result of the report did you discuss with Mr. O'Neill taking any other course of action with respect to the property?

A Yes, I did.

Q And what discussion did you have with him the first time you talked with him after receiving the telephone call or the report of January 4 or 8, 1960, to the best of your recollection?

* * *

A First I would like to say that we got three copies of the report from Larry Smith & Company and I immediately sent one to Mr. O'Neill so that he had a copy of the report. When I visited him the next time I apparently showed my disappointment and immediately he began to talk about other uses for the property.

Q (By Mr. Stephan) At the time that you talked to Mr. O'Neill, can you fix that date approximately, bearing in mind the dates of January 4, 1960 and January 8, 1960?

A No, I cannot for sure.

Q Was it before or after you received on January 13, 1960 an offer from Harry Ratner to buy the property?

A I would imagine it would be before, because, as I say, when I got the report I immediately sent him a copy of the report and we were in contact almost immediately.

Q Now, can you state whether or not Mr. Treiger subsequently came to Cleveland to discuss the content of the report with you?

A Yes, he did.

Q And what was the nature of the discussion at that time?

A Oh, pretty much he relating to us his disappointment in the negative conclusion. I think about that time I had worked up a schematic use in the interval of some other uses for the property, and we pretty much spent the time discussing that possibility.

Q At that time then had you accepted the conclusions with respect to the negative potential of the property for shopping center purposes?

A We had. (Tr. 238-40)

* * *

Q (By Mr. Stephan) When did you first consider the Ratner offer?

* * *

A Well, we got into serious consideration after the

Larry Smith report. When it came in we gave it some consideration, yes, we did.

Q (By Mr. Stephan) When did you recommend to Mr. O'Neill that it be accepted?

A I believe after Mr. Treiger came to Cleveland and met with us on January 18th, I think immediately that night I prepared a letter and somewhere around January 20th I wrote to Mr. O'Neill and recommended that we accept the Ratner offer. (Tr. 244)

* * *

Cross-Examination

* * *

Q Did you try to sell Nutwood as a regional shopping center after receiving the Smith report and before the sale to Ridge Hills on April 29, 1960?

A Sell it as a regional shopping center?

Q Yes, sir.

A No, I think we were thinking of alternate uses and trying to develop a syndicate amongst ourselves with the express purpose that maybe we could set aside sixty acres for some other use which in time might develop into a shopping center.

Q Mr. Petti, would you kindly turn to the second phase of your deposition, Page 43. Do you have it, sir?

A Yes, I have the page.

Q Starting at line 11.

> "Q Just make it January 15th, Mr. Petti, after you received the Larry Smith report.
>
> "A When you say we were holding it for strictly residential land, I think the fact remains that that's all we had, was strictly residen-

tial land, and I don't think we had anything more to offer the buying public.

"Q And you didn't try to sell it on any other basis?

"A We did not."

Did I ask you those questions and did you give me those answers at the time I took your deposition?

A Yes.

Q And were those correct responses to the best of your ability?

A I think there is a difference between trying to sell a raw piece of land that will become a regional shopping center development as against selling a regional shopping center piece of land that had the ingredients of the accomplishments that are necessary to make it that.

MR. WHITE: May the question be read back to the witness, please. (The reporter read the last question.)

A They were, to the best of my ability.

Q (By MR. WHITE) Specifically did you represent Nutwood to anyone representing Ridge Hills as appropriate for the construction of a regional shopping center within the same dates?

A When you say within the same dates, would you identify the dates?

Q Yes. After Mr. Treiger came to Cleveland on January 18, 1960 and up to April 29, 1960, which I think was the date of the sale to Ridge Hills.

A No, I don't think there was any need to represent anything. You remember that I had represented this land prior to the Larry Smith report to the Ratner people as a good regional shopping center site. It had potential. After that I had no reason to continue.

Now, if you're trying to differentiate between before and after the report, it is possible that after the report Fred Stark in particular thought that it was a good regional shopping center site.

Q You mean after the sale, don't you, Mr. Petti?

A Yes.

Q Not after the report but after the sale to Ridge Hills?

A Well, my memory there is a little fuzzy. I couldn't tell you I mean definitely as to when this took place. Mr. Stark's relationship with me was not very cordial at the time, mine wasn't with him, so I can't say that I done much representing to Mr. Stark at all.

Q Mr. Stark is deceased now, is he not?

A That's right.

Q And Harry Ratner is deceased now?

A That's right.

Q And to identify Mr. Stark, he was in effect a partner with Mr. Harry Ratner in the Ridge Hills Development Company as you understood it, isn't that correct?

A Not at the time of my negotiations with Harry Ratner. As a matter of fact, Harry Ratner didn't even want me to indicate to Fred Stark what the price was.

Q Well, Mr. Petti, now can you answer my question to the best of your knowledge when it became known to you that Mr. Stark had an interest in Ridge Hills?

A I had been told by Harry Ratner that they intended to bring Mr. Stark in as a partner if they were successful in acquiring the property.

Q Now, Mr. Petti, would you kindly turn to Page 413 of your deposition.

MR. STEPHAN: Is that 413?

MR. WHITE: Yes.

A I have it.

Q (By MR. WHITE) Did I ask the question which appears starting at line 21,

> "Q Did you represent this property to the Ratners as appropriate for the construction of a regional shopping center?
>
> "A I did not."

Did you give that answer?

A Are you talking about after the report or before the report?

Q Did you misunderstand my question at that time?

A Well, I'd like to read the beginning of this, because I think somewhere we were differentiating before the report or after the report.

Q You may read as much as you wish.
(Brief pause.)

MR. STEPHAN: I don't want to suggest any answer, but, Mr. White, may I inquire, if your Honor please, whether a number of pages earlier at Page 409, line 8, the beginning of your question, "This is March 1, 1960" relates to the question on Page 413 to which you refer?

MR. WHITE: That's correct.

Q (By MR. WHITE) Mr. Petti, I'm sure you will agree if you read the context that my question was within the context of between the time when you met with Treiger on January 18th in Cleveland and April 29th, the date of the sale to Ridge Hills. Did you understand my question in that way?

A If you're talking whether I represented this property as a regional shopping center between January 18, 1960 and the date of the sale, I said I did not.

Q Yes, and is that your testimony here today?

A Yes.

Q Would that include nonrepresentation to Karl Kammer, the attorney for Ridge Hills Development Company?

A When you say nonrepresentation, I'm not—

Q Did you represent Nutwood as a good regional shopping center site to Karl Kammer between those dates?

A Well, I think we'd have to go back to my relationship with Karl Kammer prior to this.

Q I think you can answer the question.

MR. WHITE: And I ask your Honor to have him answer the question.

THE COURT: Yes, I think that can be answered, Mr. Petti. You may explain after you answer if you need to.

A Well, I think about this time the Ratners felt that they had succeeded in getting us to deliver the property, and the only thing that they were interested in was in closing this deal and getting the property in their name. They needed no selling, they were anxious to acquire this property. I did not at that time need any selling tools or any pitch or any embroidering of this property to make a sale. The deal was being closed.

Q (By MR. WHITE) Mr. Petti, my question is a very simple, direct one. Namely, did you represent to Mr. Karl Kammer, a member of the Cleveland bar, Nut-

wood as a regional shopping center between January 18, 1960 and April 29, 1960 or not?

A My negotiations were not with Karl Kammer. Karl Kammer was an attorney and—

THE COURT: Now, just—

A I did not.

THE COURT: All right.

A To the best of my recollection I did not.

MR. WHITE: May I have Exhibit 348, please. (The exhibit was handed to Mr. White.)

Q (By MR. WHITE) So the record may be entirely clear, Mr. Petti, your testimony is that you did not represent Nutwood to anyone as a good site for a regional retail center or shopping center between the time you talked to Mr. Treiger on January 18 and the time of the sale on April 29, 1960, is that correct?

A At the time of the sale, the closing of the sale?

Q Well, April 29, 1960 is the date of the sale.

A I can't say. It's possible that Fred Stark coming into my office, who felt that he was very knowledgeable in commercial real estate, might have initiated some participation together with me. I had good knowledge of the Nutwood site, he had been successful in building for department stores, had the money, and might have wanted me to use our company in exposing this property, but I can't rightfully say as to whether it was then or maybe it was right after April 29th. There was a little bit of division between the thinking on Fred Stark and Harry Ratner as to this property.

Q Well, let's say other than to Fred Stark who is deceased, did you represent Nutwood Farms as a good

retail regional site between January 18 and April 29, 1960, to the best of your recollection?

* * *

A It's very possible that I did.

Q (By Mr. White) To whom?

A I wouldn't remember to whom, but there was never any doubt in my mind that Nutwood was a good regional retail site, as for its location, as for its access roads, as for its ownership, and there were people in the business that could put these things together without needing a market studies. So it is possible, as I say, that I might have represented this to others as a good location for a good regional shopping center site.

Q In this interval?

A Well, now you've got me there. It's pretty difficult for me to pin point it at that interval.

* * *

Q (By Mr. White) Did you represent Nutwood to Edward J. DeBartolo or one of his representatives after January 18, 1960 as a good regional retail site?

A Yes, I did.

* * *

Mr. White: May this letter be placed before the witness, please. (A paper was placed before the witness.)

Q (By Mr. White) Mr. Petti, I show you what appears to be a letter dated January 29, 1960, three pages, and I ask you to refer to the third page and ask you whether that is your signature?

Mr. Stephan: May I first of all, if the Court please, inquire if this letter comes from any file

heretofore tendered by either side and, if so, its date and page number.

THE COURT: It comes from one, as I recall, that was marked for impeachment purposes.

MR. WHITE: That's correct, your Honor.

THE COURT: Marked and sealed.

MR. WHITE: So your Honor and Counsel may follow my examination, I have extra copies. (Papers were handed to Mr. Stephan and the Court.)

Q (By MR. WHITE) Is this your signature on the third page of this document, Mr. Petti?

A It is.

Q Is this a letter which you sent to Mr. Galvin on or about the date it says, namely January 29, 1960?

A Yes, it is.

Q I notice that there is a copy shown to W. Savage. Who is he?

A I'm trying to remember this Savage, because there was an incident where some promoter came out of the blue, and Nutwood had been exposed to him by someone and he came to us and thought that he could put this thing together because he had contacts in New York or some such thing, but after borrowing twenty dollars from me I think I never heard from him again. I think the guy turned out to be a complete phony, and we did send him—he wanted this data, and inasmuch as we had it we sent him a copy of it.

Q Do you recall Mr. Galvin having called you shortly before January 29, 1960 and telling you that he had a prospect looking for undeveloped shopping center property?

A I think my contact with Peter Galvin came through his dad, Mr. Sidney Galvin, who was also familiar with the Nutwood site at the time when we were trying to interest Allied, and when I made known to Mr. Galvin that we might consider selling the Nutwood site outright, I think it was he that asked me to get in touch with his son or asked his son to get in touch with me, and that is how that contact was made.

MR. WHITE: May the question be read back, please. (The reporter read the last question.)

Q (By MR. WHITE) Can you answer my question, Mr. Petti?

A Peter Galvin had a party for shopping center property, is that what—

Q I'll repeat the question once more. Do you recall Mr. Peter Galvin having called you shortly before January 29, 1960 and telling you that he had a prospect looking for undeveloped shopping center property?

A I don't recall the call, but it's possible that it was made known to me that Peter Galvin had a prospect for shopping center property.

Q Do you remember telling Mr. Galvin at that time that Nutwood in your opinion had good potential for a major retail center?

A It's possible that I did, yes.

Q And this was after January 18, 1960?

A It would have been, yes.

Q And before April 29, 1960?

A Yes.

Q Didn't you as a matter of fact meet with Peter Galvin and Mr. Savage on or about January 25, 1960?

A Peter Galvin and Savage had no connection whatsoever.

Q Why was it then that you sent a copy of this letter to Mr. Galvin to Mr. Savage?

A To the best of my recollection Mr. Savage was brought to me by Bill Lyons, who was our accountant at the time, and he told me that this Savage was a very knowledgeable person and had contacts and thought that he could do something on Nutwood. I don't recall that it was Peter Galvin's prospect, because this Savage was a promoter type individual, and I think that was the reason that we upped the price on it to allow for commissions for either Savage or Mr. Peter Galvin.

Q Is it your testimony that you did not meet on or about January 25, 1960 with Mr. Galvin and Mr. Savage together to discuss Nutwood?

A I'm trying to recollect. I gave it no significance for a long time. It's just possible that we did meet together. I don't know what the connection was between Savage and Galvin, to be honest with you.

Q Could I refresh your recollection by saying that on that occasion you told them that Nutwood had good potential for a regional shopping center?

A I thought it had a great potential.

Q Well, did you or did you not tell Mr. Savage and Mr. Galvin on that occasion that it had a good potential for a regional shopping center?

A I think at that time we were exchanging ideas, and we agreed that it had great potential.

Q Do you mean Mr. Savage and Mr. Galvin told you they thought it had great potential?

A Well, Mr. Galvin was quite experienced in the real estate business, his dad was a very learned man, and I think, yes, between the three of us we were trying to see what we could do with this for a regional shopping center. There were others in the marketplace that were putting these things together over and above the recommendations of market analysts. Because we were ruled out, it didn't necessarily rule out everybody else.

Q Specifically, Mr. Petti, didn't you tell those two gentlemen on the occasion when you met with them in the last week of January 1960 that you thought this was a good retail center?

A I said it had good retail potential, the site, the access roads, the expendable income. If somebody wanted to hold it five, six, eight, ten years, yes, there was a lot of potential there.

Q Was Mr. Savage interested in buying this property for ten years hence?

A It's difficult for me to explain to you—Mr. Savage to anyone. He was a complete phony. He borrowed twenty dollars from me and I never saw him again. He gave me a phony address and a phony telephone number. It was a very interesting experience.

MR. WHITE: Would you read the question back, please, Mr. Reporter. (The reporter read the last question.)

A As I tried to tell you, Mr. Savage—

THE COURT: Now just a moment.

A No, he was not.

Q (By MR. WHITE) Mr. Petti, referring you to the second from the last paragraph of this Exhibit 348-A, doesn't it appear that you were offering the prop-

erty to Mr. Galvin and Mr. Savage for $3,750.00 an acre?

A It does.

MR. STEPHAN: Excuse me. I understand that the envelope is Exhibit 348 containing impeaching material. Has this now been marked Exhibit 348-A?

MR. WHITE: I would ask that it be so marked.

THE COURT: It will be so marked.

MR. WHITE: And I would like to offer it, your Honor.

THE COURT: Any objection?

MR. STEPHAN: I have no objection, your Honor.

THE COURT: It will be admitted. (Exhibit No. 348-A was marked for identification and admitted in evidence.)

* * *

Q (By MR. WHITE) Was it the Smith report which caused you to raise the asking price of Nutwood from $3,500.00 to $3,750.00 an acre?

A No, it was not.

Q You had previously never offered the property at that price, had you?

A No, we had not.

Q Did either Mr. Galvin or Mr. Savage ask to see the Smith report?

A I can't remember. We were perfectly willing to make it available to them, and so the letter states.

Q Did anything occur between January 18, the date of Mr. Treiger's conference with you in Cleveland, and January 29 to change your mind that Nutwood was suitable for a regional shopping center?

A I don't think anything changed my mind. The only thing was the report submitted to me that caused us to abandon our program. It didn't mean that somebody else couldn't take it on.

Q Well, specifically did anything occur between January 18 and January 29, 1960 which completely changed your view of Nutwood?

MR. STEPHAN: I object to that as repetitive. He just answered that precise question.

THE COURT: He doesn't get an answer to his questions, that's the trouble. Mr. Petti, I want you to pay close attention and answer the questions. We will make much better progress. Overruled.

MR. STEPHAN: May the question be read back?

THE COURT: Yes.

MR. STEPHAN: And will the witness kindly listen carefully and answer to the best of your ability. (The reporter read the last question.)

THE COURT: Is that the last question?

THE REPORTER: Yes, your Honor.

A Not that I can think of that completely changed my view of Nutwood, no.

Q (By MR. WHITE) Is it your testimony then, Mr. Petti, that you relied on the Smith report to the extent that it was favorable, namely, such aspects as good access, but did not rely on the negative aspect that there was too much competition?

A I think that was precisely my conclusion as to the report.

Q In fact on Page 2 of Exhibit 348-A, looking at the last sentence under No. Arabic II and quoting, so we may all have it before us,

"It is our considered opinion that this is the only location in the northeast area that is suitable for a regional center. If true, and we know of no other, this should provide insurance against significant competition of a regional nature."

Did you believe at that time that Nutwood had no significant competition of a regional nature?

A Well, actually this was a letter, I think, that we had prepared before the report, and I think we merely sent it out almost verbatim at that time when somebody requested some information relative to Nutwood.

MR. WHITE: May the question be read back, please?

THE COURT: Yes. Pay close attention to it, Mr. Petti. (The reporter read the last question.)

A Yes, I did believe that it had no significant competition as a true regional site.

MR. WHITE: May this letter be—

Q (By MR. WHITE) First, did you carry on any other correspondence with anyone at Osterndorf-Morris Company?

A None that I can recall specifically, other than the fact of this contact from Peter Galvin.

Q Do you know Donald Cloak, the president of Ostendorf-Morris?

A I've met him, yes.

MR. WHITE: May this letter be marked as Exhibit 348-B, please.

THE CLERK: B, did you say?

MR. WHITE: B. (Exhibit No. 348-B was marked for identification.)

THE COURT: Do you have a copy?

MR. WHITE: Yes, I do, your Honor. (Papers were handed to the Court and plaintiffs' Counsel.)

Q (By MR. WHITE) Does the document which has been marked as Exhibit 348-B bear your signature?

* * *

A Yes, it bears my signature.

Q (By MR. WHITE) Is this a letter which you sent to Donald Cloak of Ostendorf-Morris on or about June 12, 1959?

A It is. (Tr. 382-89, 391-402)

* * *

Q (By MR. WHITE) Do you have Exhibit 235 in front of you?

A Yes, I do.

Q Is this a brochure which you prepared for the May Company on or about June 29, 1960?

* * *

A Yes, it is.

Q (By MR. WHITE) Now, at the time you prepared this brochure did you believe that Nutwood was a good location for the development of a major retail center?

A I believe for the right people, yes, it could still have been developed as a major retail center. We were unable to do it. (Tr. 414-15.)

KARL D. KAMMER, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A Karl D. Kammer.

* * *

Q (By MR. WHITE) Where do you live?

A 22888 Holmwood, H-o-l-m-w-o-o-d, Drive, Shaker Heights, Ohio.

Q What is your profession?

A Attorney at law.

Q What is your office address?

A 1020 Leader Building and 20020 St. Clair.

Q Of what bar associations are you a member?

A Cuyahoga County Bar Association, and Ohio State Bar Association.

Q How long have you been a member of the bar?

A Since 1953.

Q Would you sketch briefly for us your educational background?

A After leaving high school I attended Western Reserve University for three years and am a graduate of Cleveland Marshall Law School.

Q Are you a member of the board of directors of any financial institutions in the Cleveland area?

A Yes, the Euclid Savings Association.

Q In your duties on that board of directors do you have any occasion to deal with the valuation of real property?

A I'm a member of the executive committee of the bank and I pass on all loans that are made by the bank.

Q Have you in your practice tended to specialize in any field?

A I specialize primarily in real estate and corporate law. (Tr. 1632-33.)

* * *

Q How long have you been secretary and counsel for Ridge Hills?

A Since sometime in 1960 when this corporation was formed.

Q Did you participate in the negotiations for the purchase of Nutwood Farms by Ridge Hills?

A Yes, I did.

Q When did the negotiations start?

A I believe it was sometime toward the end of 1959, the latter part of 1959 at any rate. (Tr. 1637.)

* * *

Q (By Mr. White) Showing you what has been marked for identification as Exhibit 198-D and referring you particularly to the last page thereof, is that your signature?

A Yes, sir, it is.

Q What is Exhibit 198-D, ignoring for the moment the penciled notations on it?

A It's an offer to purchase.

Q What property?

A Approximately 170 acres known as the Nutwood property.

Q What is the date of the offer?

A I believe it's January 13, 1960.

Q By whom is the offer made?

A Harry Ratner or nominee. (Tr. 1638.)

* * *

Q (By Mr. White) Do you know Henry Petti?

A Yes, sir, I do.

Q How long have you known Mr. Petti?

A I would say for at least eight or ten years.

Q How long before January 13, 1960, the date of Exhibit 198-D, how long before did you commence negotiations for the purchase of Nutwood?

A For at least a period of several weeks, perhaps a few months.

Q Did you have any meetings with Mr. Petti concerning Nutwood before the date of the offer of January 13, 1960?

A Yes, sir.

Q Can you tell us the circumstances which led to the offer of January 13, 1960?

A Well, after a series of meetings with Mr. Petti in regard to price, and so forth, on this property, we determined to make an offer based on the figure that is contained in the document.

Q During the period of negotiations leading to the offer of January 13th, did Mr. Petti make any statement to you or in your presence relative to any potential use of the Nutwood property?

A Yes, sir, he did.

Q What statements did he make?

A Well, he continually told us that this was one of the finest areas in perhaps the State of Ohio for a shopping center.

Q Did he make this statement on one occasion or more than one occasion in your presence during the negotiations before January 13th?

* * *

A I would say on nearly every occasion that we met on these negotiations that the subject was brought up

and Mr. Petti made the remark that, "This is a great location for a shopping center complex."

Q Did he mention what kind of a shopping center?

A Regional type, something of a large nature.

Q Now referring you to the period between January 13th and April 29th when the record shows that Ridge Hills purchased the property, did you meet with Mr. Petti during that period?

A Yes, sir, we did.

Q What was the occasion for those meetings?

THE COURT: I didn't get those dates.

MR. WHITE: January 13th and April 29th, your Honor, the date of the original offer and the date of the purchase.

A The original offer had not been accepted and the negotiations continued based on determining the exact number of acres. There had been some error in the exact number of acres, and also it had been alluded to regarding the taking by the State Highway Department, and this taking was part of the second offer, certain moneys to be received in the event that the State Highway Department took that portion of the land after the Ridge Hills Development Company acquired it, and so forth, what happened to that money, and Mr. O'Neill, counsel for the seller, was very insistent upon something being put into the agreement regarding that.

Q Did you meet Mr. Petti at any of these meetings?

A Yes, Mr. Petti was at all the meetings.

Q Did Mr. Petti make any statements to you or in your presence at any of these meetings concerning the potential use of Nutwood?

A Yes, this was a continuation of the same type of usage for the property. It would be used for a regional shopping center, some sort of a complex.

Q On how many occasions do you think you met with Mr. Petti between January 13th and April 29th incident to these negotiations for the purchase of Nutwood?

A I would imagine three or four times.

* * *

Q (By Mr. White) In your presence did Mr. Petti discuss at any of these meetings any work that he would do for you?

A Yes, he indicated a desire to be the leasing agent in the event we acquired the property.

Q Did he indicate what types of leases he might negotiate for you?

A Well, we at all times discussed the possibilities of department stores and other leases of a major nature.

Q Now, by these meetings did you understand, Mr. Kammer, that I was speaking of the period between January 13th and April 29th?

A Yes, sir, those were the ones that you were referring to previously.

* * *

Q (By Mr. White) Did you or anyone else on behalf of Ridge Hills during this period between January 13, 1960 and April 29, 1960 tell Mr. Petti of the use to which you intended to put Nutwood?

A Yes.

Q What did you say?

A We had hoped to put Nutwood to use as a regional

complex consisting of a major shopping center of the regional type, a series of laboratories and a motel and perhaps bowling alleys and other sorts of commercial enterprises, and in one specific area some homes if possible.

Q At any time during the negotiations which led to the sale on April 29, 1960 did Mr. Petti in your presence ever express any doubt with respect to the use of Nutwood for a regional shopping center?

A Not at any time.

Q Did Mr. Petti present to you and Ridge Hills during the negotiations any studies or other materials concerning Nutwood?

A We had a series of plot plans that Mr. Petti presented us that had been prepared.

* * *

Q (By Mr. White) Showing you Exhibit 200-3, is the plot plan shown in this article in the Cleveland press of June 29, 1960 one of the plot plans submitted to you by Mr. Petti?

* * *

A If it's not the exact one, it's a very close replica of it.

* * *

Q (By Mr. White) Can you tell us whether Mr. Petti presented to Ridge Hills in your presence plot plans similar to this in connection with the use of Nutwood before April 29, 1960?

A Yes, sir, he did.

* * *

Q (By Mr. White) Showing you Exhibit 235, and again recognizing that this bears date of June 29, 1960, can you tell us whether Mr. Petti during the

negotiations for the sale of Nutwood to Ridge Hills presented to you any material such as this?

* * *

A I'm looking at Land Use Study C dated February, 1959. This is an exact replica of what was presented in the newspaper article. This was presented to us.

THE COURT: When?

A Between the dates of January 13 and April 29, 1960. (Tr. 1640-50.)

* * *

Q (By MR. WHITE) For what period of time was Mr. Petti active in promoting Nutwood for Ridge Hills as a regional shopping center?

A I would say from the inception—

THE COURT: You mean for his company?

MR. WHITE: Yes.

A From the inception of our negotiations through the period of time that he was given an exclusive, which would bring it into 1960 to 1962. (Tr. 1652)

MILDRED WINSLOW ASHCRAFT, DIRECT EXAMINATION:

* * *

THE COURT: Mr. Stephan, what are you seeking to establish by Mrs. Ashcraft's testimony?

MR. STEPHAN: Basically, your Honor, her reliance as a plaintiff upon the report of Larry Smith & Company in determining to sell Nutwood Farms to the Ratners after receipt of the report, Exhibit 29. (Tr. 77)

* * *

Q If you had known in the spring of 1960 that Larry Smith was in the process of buying Severance, would you have determined to sell Nutwood?

A I—

MR. WHITE: Excuse me. Is that the end of the question?

MR. STEPHAN: Yes.

THE COURT: He hasn't let his voice fall yet, I don't know whether it is or not.

MR. WHITE: Your Honor, I have several objections to that question. In the first place, in form it is leading and suggestive. In the second place, it is self-serving. In the third place, it is just calling for a pure speculation.

MR. STEPHAN: Well, if your Honor please, in the first place it is not intended to be leading. In the second place, obviously anyone's evidence in a fraud case with respect to reliance may be what Mr. White characterizes as self-serving. You rely or you don't rely. And in the third place, there is nothing in it that is speculative or conjectural. It is to ask this lady to reconstruct a fraud situation and to ask her whether or not she would have sold the property. You must wait, Mrs. Ashcraft, until Counsel has been heard.

THE COURT: Is there something more you want to say, Mr. White?

MR. WHITE: No, your Honor.

A Well, I assume that if—

THE COURT: Just a moment. I have not ruled yet, Mrs. Ashcraft.

A Oh, excuse me.

THE COURT: I am going to permit her to answer.

A In the first place, I don't think if Mr. Petti or Mr. O'Neill—

THE COURT: Now just answer the question, Mrs. Asheraft.

Q (By MR. STEPHAN) Just answer the question. If you had known independently that Larry—I think you understand the question.

A Yes. No, I would have been—I would not have. (Tr. 85-87)

* * *

CROSS EXAMINATION

* * *

Q Would it have made any difference to you if you had known that Larry Smith & Company was still acting as advisers and consultants on the Severance property at that time?

* * *

A I would have thought that if it was all right with Mr. O'Neill and Mr. Petti, then it was all right with us.

Q (By MR. WHITE) Would it have made any difference to you? I think your Counsel asked you whether it would have made any difference to you if you had known about certain facts. Now I am asking you whether it would have made any difference to you if you had known that Larry Smith & Company were continuing to act as advisers and consultants on the Severance property at the time they did the study for Hilltop.

MR. STEPHAN: I object to that on the grounds it is repetitive. She has just answered exactly that question.

THE COURT: Overruled. Do you know what the question is, Mrs. Asheraft?

A I'm a little vague about it.

THE COURT: Why don't you restate it, Mr. White.

Q (By MR. WHITE) Did you know that Larry Smith & Company was acting as consultants and advisors on the Severance property in December and January, 1959-1960?

A I don't believe I did.

Q Would it have made any difference in your course of action if you had known that they were acting as advisers and consultants then?

A Not if it hadn't made any difference to Mr. O'Neill and to Mr. Petti.

Q Is it your testimony then that you would have no independent opinion about it?

A On this sort of matter I couldn't have. I wouldn't know that much about it.

Q So is it your testimony that you just relied completely upon Mr. O'Neill?

THE COURT: And Mr. Petti, she said.

Q (By MR. WHITE) And Mr. Petti?

A And Mr. Petti. Yes, it is. In matters of this sort I would have to. I was obliged to because this was the way it was set up and the way we wanted it to be. (Tr. 96-98)

* * *

Q Where were you when you received this letter from Mr. O'Neill?

A Dated January 22nd?

Q Yes.

A I was in Madrid, Spain. (Tr. 99)

* * *

Q In any event, Mrs. Asheraft, you had not read the

Larry Smith report until this litigation commenced, is that correct?

A That is correct.

Q And the only information which you received about the Smith conclusions before you sold the property to Ridge Hills was in Mr. O'Neill's letter of January 22, 1960 to you, is that correct?

A We had conversations about it prior to that time.

Q Are you referring to a telephone call?

A No, personal conversations before I went away.

Q This was before Mr. Smith was hired. I'm talking about the Smith conclusions, Mrs. Asheraft.

A I think—well, I don't know about the dates and all except it seemed to me that Larry Smith was an expert who was being called in to do this.

THE COURT: His question to you, Mrs. Asheraft, was this: Did you ever consult verbally with Mr. O'Neill concerning the conclusions reached in the Smith report?

A No, except the letter that he sent us saying that it turned out badly.

Q (By MR. WHITE) This is the letter of January 22nd to which we have already referred, is that correct?

A That it turned out badly, yes. (Tr. 106-107)

AILEEN WINSLOW POWELL, DIRECT EXAMINATION:

* * *

Q (By MR. STEPHAN) Did you rely upon the letter of January 22, 1960—upon what did you rely in deter-

mining to participate as a co-heir with your sister in selling Nutwood Farms?

A Well, I—

* * *

A Oh. Yes. Well, I relied wholly on my sister and Mr. O'Neill.

Q (By Mr. Stephan) Now, did you receive a copy of the letter of January 22, 1960?

Mr. Stephan: Would you place before the witness Exhibit 198(a). (The exhibit was placed before the witness.)

A Yes, I got this when I was in St. Thomas. I received it from my sister. (Tr. 122-23)

* * *

Redirect Examination

* * *

Q (By Mr. Stephan) Did you yourself see the Nutwood report of Larry Smith & Company?

A No.

Q From what source did you get information as to the contents of the Nutwood report of Larry Smith & Company?

A To the best of my recollection it was in this letter here that I got the copy of Larry Smith's letter.

Q Reference to it?

A Reference to it, and this second paragraph.

Q And by the use of the word "here" what are you referring to?

A It was sent to me in St. Thomas.

Q Yes, but by the use of the word "here" are you referring to this letter of January 22, 1960 that is before you?

A Yes.

* * *

RECROSS EXAMINATION

By MR. WHITE:

Q Just for clarification, one question. You referred to a copy of the Larry Smith letter.

A I meant Mr. Petti's letter. (Tr. 138-39)

D. Excerpts from Testimony Bearing on Issues of Justification for this Litigation and Measure of Punitive Damages (Specifications of Error Nos. 9 and 10)

WILBERT J. O'NEILL, DIRECT EXAMINATION:

* * *

Q Will you please tell me whether you have any recollection of a meeting held some time after learning that Larry Smith & Company had acquired a financial interest in Severance?

A Yes. Did you say, do I have a recollection of a meeting?

Q Right.

A Yes; Mr. Petti, and Mr. Treiger and I met at the Sheraton-Cleveland, I think, on the 12th of August, 1960, and Petti told me, when we were going down to the hotel to meet Mr. Treiger, that he had complained bitterly about their concealing from him the fact that when they accepted this employment they were already negotiating to buy the Severance Shopping Center, and on about the 1st of August it had been announced that they had acquired it.

* * *

A Yes; Mr. Petti and I and Mr.—

Q The answer is "Yes"?

A Yes.

Q Now, if I had asked you what happened at that meeting, would the expanded answer just objected to have been given by you?

A Well—

MR. WHITE: I think he can answer that "Yes" or "No."

A It was much more direct than that.

Q All right. Tell us what happened.

A Mr. Petti told Mr. Treiger in very definite terms that they were shocked and surprised to learn that his firm had accepted employment to give its professional opinion on the suitability of Nutwood for a shopping center development at a time when they were negotiating to buy the Severance Shopping Center property.

Q Did Mr. Treiger offer any explanation?

A Yes; he offered the explanation—

Q Let's just answer the question. Did he offer an explanation?

A Yes.

Q Did he have with him a piece of paper, a copy of which has been so identified heretofore and marked as Exhibit No. 49?

A Yes; he did.

Q Will you tell me, without taking the time that I wish I could afford for you to read again this memorandum to refresh your recollection, your best recollec-

tion independently of taking that time, of what the substance was of Mr. Treiger's comments?

* * *

Q Please continue, Mr. O'Neill.

A Well, I think I have already said that Petti indicated that they were shocked and surprised to learn that Larry Smith & Company had accepted employment from them when they were already negotiating —

Q Yes; you have.

A —to buy a neighboring and competing property, and Treiger —

Q Just a moment. Let me ask you a question. (Tr. 2638-41)

TOM M. CRUME, DIRECT EXAMINATION:

* * *

Q (By MR. STEPHAN) In any of your discussions with Mr. Treiger or any representative of Larry Smith & Company were you furnished or informed concerning any underlying working papers until after this lawsuit was started?

A Well, there was some reference to working papers. We knew that they existed, but we were never furnished them.

THE COURT: Did you ever ask for them?

A No, sir. (Tr. 492)

JOHN MARINES RIENSTRA, DIRECT EXAMINATION

* * *

Q What were the general conclusions of Larry Smith & Company in Exhibit 29 under each of these two methods?

A Under each of these two methods, the conclusion was that although the site was excellent, the access was perfect, the population was large enough and showed considerable growth, that in both cases, because of the available competition, the Nutwood Farms site was not expected to support any major type of regional development.

Q Were these methods acceptable methods, in your opinion, in the profession in 1959 and 1960?

A Yes, they were. (Tr. 1144)

* * *

CROSS-EXAMINATION

* * *

Q Do you understand the differences between facts on the one hand and estimates or opinions on the other in feasibility studies?

A Yes, I do.

Q And I believe on your direct you testified that you found that this Sears store at Shoregate had 40,000 square feet rather than 70,000 square feet, do you remember that?

A Yes.

Q Now, except for that finding about the Sears store did you find any substantial errors of fact as contrasted with judgments or estimates in the Smith memorandum?

A No, I would say that in general the facts as stated, I mean not including any projections or anything, that would be right. (Tr. 1229)

E. Excerpts from Testimony Bearing on Issue of Authorization or Ratification of the Nondisclosure by Smith Partners, Laurence P. Smith, Frank Orrico and Frederick Arpke

LAURENCE PATTEN SMITH, DIRECT EXAMINATION:

* * *

Q Did you do any work personally on the Nutwood memorandum, Exhibit 29?

A No.

* * *

Q (By MR. WHITE) Did you do any work personally on what has been called the review memorandum, Exhibit 10?

* * *

A No.

Q Were you aware during the time that these two memoranda were in preparation that your company was doing or had done a feasibility study of Nutwood Farms for Hilltop Realty?

* * *

Q (By MR. WHITE) Mr. Smith, assume that my last question to you is addressed to as of the dates say of January 1, 1961. Had you ever heard of either Nutwood Farms, Hilltop Realty or Henry Petti by that date to the best of your recollection?

A No.

THE COURT: What date?

MR. WHITE: I made it January 1, 1961, your Honor. That's all.

CROSS-EXAMINATION

By MR. STEPHAN:

Q Mr. Smith, when after January 1, 1961 did you first

hear of Hilltop Realty or Henry Petti or Nutwood Farms?

A I can't fix that certainly, but the first clear recollection that I have was when I was informed that litigation was in progress, and my secretary told me that and I asked her what it referred to and she said that there had been some discussions over a year or so previous to that. It would be some time probably in 1961 or '62.

Q Well, this lawsuit, I think, if Counsel will stipulate with me that the complaint was not filed until two years later, or January 4, 1963. Now, is it your testimony that you didn't know anything—

MR. STEPHAN: You will so stipulate, won't you, Mr. White?

MR. WHITE: Whatever the file shows. I'm sure it is January, 1963. As to the specific date, I don't know.

Q (By MR. STEPHAN) Is it your testimony, that you learned through your secretary sometime after—

* * *

A Well, my first clear recollection was one when of my secretary, I believe it was Miss Bitz but I'm not clear on that, told me that litigation had commenced and she reminded me that I had been informed that there had been discussions about some complaint about some work that we had done that I should have known before, but I have no recollection as to when those discussions were. (Tr. 2379-82)

* * *

Q (By MR. STEPHAN) Is there in your diary or time sheets any reference anywhere to Hilltop or Nutwood?

MR. WHITE: I will object unless some time is placed on it.

Q (By MR. STEPHAN) Up to January 4, 1963.

THE COURT: And by "diary" you mean his time sheets?

MR. STEPHAN: In Exhibit 233, your Honor, he makes reference to "my diary." Now, I don't know what—

THE COURT: Diary or time sheets, Mr. Smith, you may answer that question.

A There may be in the few months prior to that because, as I say, at the time that I was first informed of the litigation to an extent that I presently have recollection, when I raised the question as to what the so and so was about I was informed that there had one or two discussions before or that there had been previous discussions over a period of months. I don't know what the period was, and at that time I may have made a note that there was a discussion about something in a diary possibly in 1962, late '61. (Tr. 2386)

* * *

Q (By MR. STEPHAN) Would you look at Exhibit No. 58-A, the cover sheet, being a letter from the Cleveland Counsel for Hilltop Realty dated about October 20, 1960, and tell me when that was brought to your attention?

A I don't believe there is any cover letter here. The first thing here is a letter—

Q Oh, I beg your pardon.

THE COURT: It is a letter dated October 20, 1960. There is only one part of that file that was admitted, 58-A.

MR. STEPHAN: Yes, I beg your pardon. (The exhibit was placed before the witness.)

Q (By MR. STEPHAN) When was that brought to your attention, Mr. Smith?

A This letter?

Q Yes, sir.

A This particular minute. I've never seen it before.

* * *

Q (By MR. STEPHAN) Was this document made available to you, whether you have seen it or not?

A I can't tell from observing it. I have no way of knowing. I haven't seen it.

Q All right. (Tr. 2449-50)

* * *

Q Did you have any knowledge at any time before the substantiating report was prepared that such a report was in process of preparation?

A No.

Q Such knowledge was available to you, was it not?

A If I had known that there was something to substantiate I suppose I could have asked and I could have found out whether it was. I didn't know that there was anything to substantiate. (Tr. 2452)

FRANK ORRICO, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A My name is Frank Orrico.

Q Where do you live?

A 1745 92nd Northeast in Bellevue, Washington.

Q Are you one of the defendants?

A I am.

Q Are you one of the partners of Larry Smith & Company?

A I am.

Q About how long have you been a partner?

A I've been a partner since the company was organized.

Q What services did you perform for the partnership or function did you fulfil in the fall of 1959 and the winter of '59-60?

A Oh, I sat primarily in partnership meetings dealing with policy matters. I was not engaged in any active consulting work at that time.

Q Are you also an officer of Winmar Realty Development Company?

A I am.

Q What office do you hold?

A I'm president of Winmar Realty.

Q What was your function with respect to Winmar during this same period of the fall of '59 and the winter of '59-60?

A I was responsible for the operation of the company and dealing with all of its service activities to—

THE COURT: Which Winmar Company are you speaking of?

A Winmar Realty Development Company.

Q (By MR. WHITE) Do you still have that function?

A I do.

Q When did you first hear of Nutwood Farms?

A I'm not exactly sure of the date, but it had to be some time after the fall of 1960.

Q Had you previously heard of Hilltop Realty Company to the best of your recollection?

A To the best of my recollection I had not, or did not.

Q Had you heard of Mr. Petti, the president of Hilltop?

A I did not.

* * *

CROSS-EXAMINATION

* * *

Q (By MR. STEPHAN) Can you fix more accurately than some time in the fall of 1960 the date when you first heard of Nutwood Farms?

A I cannot fix it exactly. I know that it had to be some time in the fall of 1960 because I do know who it was that first made me aware of the situation, and it happens to be an attorney in Cleveland and he is able to check as to when he found out about it, so he couldn't have told me about it before he knew about it and he found out about it in September of 1960, and as nearly as I can recall my first association with this particular individual was not until some time in the fall and winter of 1960.

Q I don't want to impinge on privileged documents or communications. Was this your own attorney?

A This was an attorney for Severance Center. Actually Severance—it was an attorney hired to engage in certain work for Severance Center, yes.

Q Then it was not your own attorney?

A Well, I don't know—for me personally?

Q Yes.

A No.

Q Who was it?

A It was Herb Spring of Baker, Hostetler.

Q Well, let me see. I understood in the record in this case that Herbert Spring of the Baker, Hostetler firm represented Larry Smith & Company in Cleveland, Ohio at that time. Am I mistaken?

A To my knowledge this could be — I'm not exactly sure. My recollection is that we were using Herb Spring in connection with Severance Center. We were in the formation of the various companies at that time and my recollection is that he was working for Severance Center.

* * *

Q (By Mr. Stephan) What did you hear in the fall of 1960 concerning Nutwood Farms?

A I would have to say that my memory isn't clear enough to say precisely what I heard. Actually, if I can recall exactly, I didn't even place much attention on what was said. I remember the name Hilltop at the time, that there was some question about some work that Larry Smith & Company had done for Hilltop, and I only recall it in that frame of reference, because I had no knowledge of what Hilltop meant or what we were doing with Hilltop. When I say we, referring to Larry Smith & Company.

Q As a member of the partnership concerned with policy matters, is a reading file made available to you in Seattle for your review?

Mr. White: I will object to that unless a time is placed on it, your Honor.

THE COURT: Oh, I will permit this as a general question.

A I would say that the—the reading file is not kept from me, it's available to me, but it's in an office completely separate from where I spend my time, and I have no occasion and I have not recently in the last few years had any occasion to go into the Larry Smith & Company reading file.

Q (By MR. STEPHAN) Well now, physically, if I recall it, your office was down the hall on the seventh floor of the Central Building in about Room 707, wasn't it?

A That's right.

Q And in that same building on the third and second floors were offices of Larry Smith & Company, were there not?

A That's right.

Q And Winmar is an affiliate of Larry Smith & Company, is it not?

A I would say by definition it's an affiliate of Larry Smith & Company, yes.

Q And from time to time you were doing your major work in Winmar Realty Development Company's office up on the seventh floor, then from time to time you were down in the third floor at partnership meetings or conferences?

MR. WHITE: I will object to the vague form of the question, your Honor.

Q (By MR. STEPHAN) During the fall of 1959.

THE COURT: All right.

THE WITNESS: Your Honor, am I to answer the question?

THE COURT: Yes, limited to the fall of 1959.

A Actually to say that from time to time that I worked in Winmar's office is not the case. I worked there all the time. To my knowledge I had no occasion to do any work in the Larry Smith office, and I believe that the record will show that most of the meetings that I attended as a partner of Larry Smith & Company were held in locations other than the offices of Larry Smith & Company, because as a matter of policy Larry Smith & Company's meetings are generally held outside the offices.

Q (By MR. STEPHAN) Well, all right. The reading file was avaliable to you?

A It was not kept from me. I mean there was no special location for a reading file to be placed for anyone from the Winmar office to read, whether he was a partner of Larry Smith & Company or not. But as far as it being available in the sense that it wasn't kept from me, yes, it was available.

MR. STEPHAN: Exhibit No. 58, your Honor, was I think offered and then rejected on the grounds that it is cumulative, but it is the document which contains the Seattle file on Hilltop Realty. I have no purpose to reoffer it or to offer cumulative evidence, but it is a shorthand way of referring to a series of letters that have exhibit numbers.

THE COURT: I assume that your theory is that there is information in this file which should have brought these matters to his attention.

MR. STEPHAN: That's right, your Honor.

THE COURT: But he has indicated he did not read them.

MR. STEPHAN: That's right, your Honor.

THE COURT: What is before me now?

MR. STEPHAN: The request to tender Exhibit No. 58 to the witness for the sole purpose of enabling him to refresh his recollection.

THE COURT: All right, you may do that. (The exhibit was placed before the witness.)

Q (By MR. STEPHAN) Can you tell me by examining Exhibit 58, which begins with the first inquiry by Hilltop of September 14th and I think goes through late in the fall of 1959, the first information that you recall having been brought to your attention? Just give me the date of it and I can then identify it as an exhibit.

A I could say that I have never seen any of these until just now, that I've never had any occasion to.

Q That is, you have never seen any of these papers?

A No, I can say that up until — I would say within thirty days I have never seen the Hilltop Realty letterhead. I had no occasion to.

Q Well, have you ever seen any of the interoffice memoranda concerning it between Larry Smith & Company?

A No. I have not. To my knowledge I have not.

Q As a partner are you kept informed of potential sources of revenue through consulting work done by the company?

A Only in terms of gross amounts of volume by division, but not by account.

Q Did you have knowledge of the preparation of a substantiating report?

MR. WHITE: I believe that is the review memo-

randum that has been referred to in these proceedings, your Honor.

THE COURT: Do you know what he means by that?

THE WITNESS: Yes, I know what he means.

THE COURT: All right.

A I was aware that something was being done, yes.

Q (By MR. STEPHAN) What were you aware of?

A I was aware after I had heard that this question had been raised, whatever the question was with Hilltop Realty, that we had been asked to go back and do some review work. The exact date of that review or the exact time of it I couldn't attest to, but I'm aware that it was necessary to go back and do some work. (Tr. 2094-2103)

* * *

Q (By MR. STEPHAN) You knew then that some species of a review memorandum, as Counsel calls it, or a substantiating report, as the exhibits call it, was in process of preparation, did you not?

MR. WHITE: I will object unless the time is fixed.

Q (By MR. STEPHAN) Prior to the date that it was dated of December 15, 1959 [1960].

A No, I'm not sure, I'm not sure of the date as to when I became aware of it. You asked, I believe, whether or not I was aware that a review memorandum was either in preparation or had been prepared. My answer is yes, I knew that. I would say right now if I were to try to fix a date, I became aware of the review memorandum sometime in 1961, and for all I know now it might have been already delivered. I don't know the date that I became aware of a review memorandum.

Q You never looked at it yourself?

A No, sir. I had no occasion to. (Tr. 2107)

FREDERICK ARPKE, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A Frederick Arpke.

Q Where do you live?

A 401 Upland Road, Medina, Washington.

Q How long have you lived there?

A About twelve years.

Q Are you one of the defendants in these proceedings?

A I am.

Q For what span of time were you a partner in Larry Smith & Company?

A From the time of its organization until April, 1962.

Q Were you active in the partnership in the fall of 1959 and the winter of 1959-1960?

A I was a member of the partnership but not an active in consultant responsibilities.

Q What was your function for the partnership as of that time?

A I was a member of the partnership and in attendance, of course, at regular meetings of the partnership, such as annual meetings, but there were only two or three cases left because I was in the process of transferring to Winmar Realty Development Company.

Q Did you do any work on any of the reports which Larry Smith & Company did on the Severance property in Cleveland?

A No, I did not.

Q Did you do any work on a feasibility study done on Nutwood Farms in eastern Cleveland?

A No.

Q When to the best of your recollection did you first hear of Nutwood Farms?

A I can't pin that down by date because I have no vivid recollection of the project at all. I did know at about the time when the court case was threatened that this case was being threatened, but I couldn't tell you what date that was even.

Q Had you previously heard of Mr. Henry Petti or Hilltop Realty?

A No, I had not.

MR. STEPHAN: I object to that on the grounds of vagueness. Previous to what date?

THE WITNESS: Previous to the time that any legal case was instituted.

Q (By MR. WHITE) Or threatened, Mr. Arpke?

A Or threatened. (Tr. 2110-11)

* * *

CROSS-EXAMINATION

By MR. STEPHAN:

Q Handing you, please, Exhibit 58-A, dated October 1, 1960, does that refresh your recollection that it was at about that time that you understood that legal action was being suggested?

A Well, Mr. Stephan, I've never seen this letter before, I'm not conscious of having seen this letter before. The letterhead is completely new to me. I

don't recognize any of the names. I don't even see my name on here that it has been checked. If it has, it certainly was a very cursory one. This is a completely new document as far as I'm concerned.

Q You recognize on it the distribution stamp of the Seattle office, don't you, including Winmar?

A Yes, I see the stamp there, but I don't see that I have checked my name on it.

Q Was your office in the Larry Smith & Company office on the third floor of the Central Building?

A Not at this time I don't believe. I moved during this period to the seventh floor. For a long time, of course, I was right across from you on the seventh floor.

(Tr. 2113)

* * *

Q Did you know that on or about December 15. 1960—

MR. STEPHAN: May I have Exhibit 10, please. (The exhibit was handed to Mr. Stephan.)

Q —A so-called substantiating report or review memorandum was prepared?

A No, I do not know about that.

THE COURT: Is that the date it bears?

MR. STEPHAN: Yes, your Honor. It bears the date of December 15, 1960, but it is an agreed fact and borne out by the records on both sides that it was not tendered to us until February 15, '61.

THE COURT: Yes, I understand that. In your question I thought you said October.

MR. STEPHAN: Oh. Then I misspoke.

Q (By MR. STEPHAN) Have you seen Exhibit 10?

A I have not. (The exhibit was handed to the witness.)

Q You have had no connection with this partnership since 1962?

A No, not a direct connection, no.

Q And you are now semi retired, are you not, Mr. Arpke?

A That's a good word for it, yes. (Tr. 2115-16)

IV. FULL TEXT OF EX. 29.

SHOPPING CENTER OPPORTUNITIES

AT NUTWOOD FARMS

CAUSE 5767

[illegible] EXHIBIT 29

ADMITTED JUL 22 1965

Prepared for

Hilltop Realty, Inc.

January 8, 1960

Larry Smith & Company
1208 Dupont Circle Building
Washington, D.C.

LARRY SMITH & COMPANY

REAL ESTATE CONSULTANTS

1346 DUPONT CIRCLE BUILDING, WASHINGTON 6, D. C. · PHONE: ADAMS 4-8101

January 7, 1960

Hilltop Realty, Inc.
5068 Mayfield Road
Lyndhurst, Ohio

Att: Mr. Henry Petti re: Nutwood Farms

Dear Henry:

The attached memorandum summarizes our conclusions with respect to the potential for regional or intermediate shopping center development at the above property, as per our conversation earlier this week.

As I indicated to you on the telephone, our analysis indicates an absence of a sufficient potential to justify either of the above assumed developments, at least through 1970. The reasons for these findings are explained in detail in the memorandum. In summary however, the following points can be considered.

1) The population of the trading area is, in itself, sufficient to generate substantial retail spending.

2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessability throughout the trading area can be described as excellent.

3) Total retail spending by trade area residents is substantial. In view of the distance of the trade area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland) Thus, the potential for suburban facilities is very significant.

4) Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area.

The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms.

* * *

In order to be certain of our conclusion, we have checked and double checked the analysis. Frankly, it is the opinion of the office that the trading area assumed in the analysis is extremely liberal, in terms of its size. You will see in the attached maps, the area extends out toward the east some twenty to twenty-one miles. Normally, our experiences indicated a maximum reasonable zone of penetration, even where we find an absence of significant competing facilities, in the neighborhood of fourteen to fifteen miles.

Further, we have utilized what we believe are maximum suburban shares, in terms of future department store spending of trade area residents. Finally, we have discounted quite substantially the existing or soon to be developed department store facilities which will be competing with those facilieies at Nutwood Farms. Such competition between the existing and planned facilitics and those which might be developed at the subject location will, in fact, exist, in spite of the fact that the trading area which is analyzed with respect to Nutwood Farms extends toward the west from the site only a very short distance. In other words, these facilities will exert significant competition influences, even in spite of distance, simply because of the strength and extent of the developments and facilities which are availablc for comparison shopping purposes.

We have tested the conclusions, also, on the basis of assumed "shares-of-the-market", which assume that facilities can be attracted to the site, in spite of the competition. We attempt to estimate the reasonableness of those facilities attracting the sales which would be necessary in order to make their tenancies attractive from the standpoint of the owner-investor. Again, our analysis proves negative.

In summary, our study indicates an absence of a sufficient volume potential to justify the interest of major tenants, and the absence of a sufficient investment opportunity to justify the development from the standpoint of the property owners.

* * *

A similar analysis is included for you consideration with respect to an intermediate center. Again, our conclusions are not sufficiently favorable to justify continued exploration of this avenue of development with respect to Nutwood Farms.

It is our opinion that, in spite of the fact that these findings are described herein as being preliminary in nature, they are sufficiently accurate and reliable with respect to the judgments expressed that they would not be substantially changed by continued work on our part. We therefore are puting this material in your hands for your study, and suggest that you may wish us to cease the work at this point, rather than to carry it to its conclusion, in the preparation of a formal report. If you should wish us to cease, we would, of course, not expect to charge you for the full appropriation, as per our proposal letter. Through the present time, our costs on this are in the nature of $2,750.00 plus or minus.

I will be in touch with you in a few days so that we can talk about the work itself and so that you can instruct us further.

Yours sincerely,

LARRY SMITH & COMPANY

Ray L. Treiger

RT/zt

Ray L. Treiger

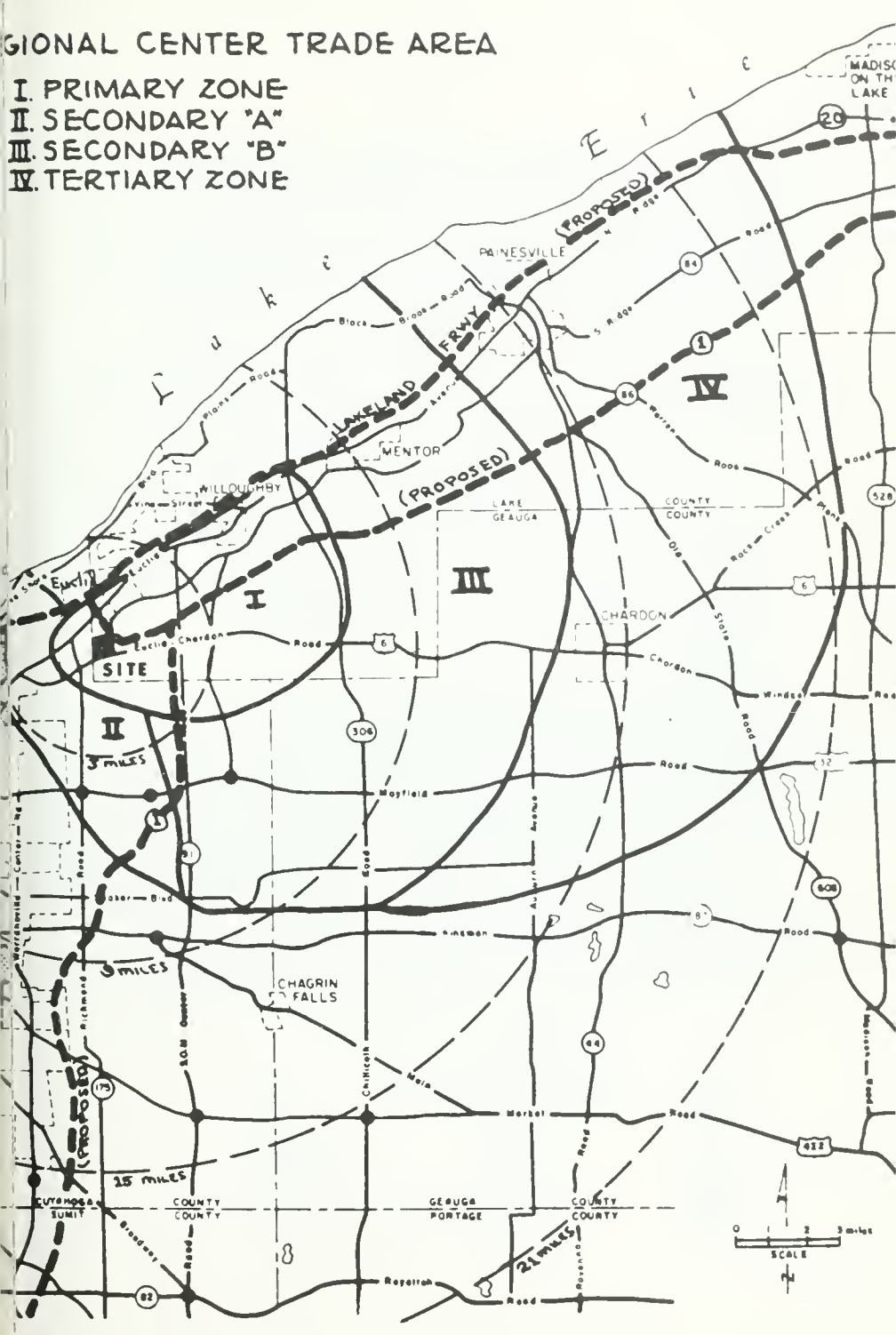
P.S. In the memorandum which follows, we have included the calculations only insofar as the department store and apparel categories are concerned. Our reason for limiting the memorandum to these two categories is that the potential in these lines of merchandise pretty well determine the extent of the total development which is justified. Our work sheets, of course, have been carried forward with all merchandise categories having been analyzed.

We have also, by the way, made an analysis for a neighborhood center. It is our opinion that a neighborhood center (i.e. one featuring convenience goods, primarily) can be developed at the subject location. However, it is our recommendation, based on the analysis to date that the development of a neighborhood shopping center be postponed until the following;

a) Development plans, at least, are formulated for the balance of the property, and
b) the planned highway improvements are carried forward.

GIONAL CENTER TRADE AREA

I. PRIMARY ZONE
II. SECONDARY "A"
III. SECONDARY "B"
IV. TERTIARY ZONE



SECTION I

ANALYSIS FOR A REGIONAL SHOPPING CENTER

Site and Access

The subject property, as indicated on the map opposite, consists of 140 acres situated on the northwest corner of Chardon Road (U.S. Highway 6) and Bishop Road (Ohio State Highway 84) in Lake County, about three miles east of the city limits of Cleveland.

This Nutwood Farms site is located adjacent to the proposed Euclid spur connecting Ohio State Route 1 (North-South Freeway) with the Lakeland Freeway. These two freeways have not been constructed to date, but it is estimated by the Ohio State Highway Department that the Euclid spur would be open to traffic by the end of 1962.

Access to the site may be considered to be excellent. The property will have frontage on the three highways mentioned above (Routes 6 and 84 and the spur connecting the two freeways), plus excellent access from Euclid Avenue (U.S. 20), a major six-lane artery, via the Euclid spur. The highway department has indicated plans for a four-ramp cloverleaf at the point where the Euclid spur crosses Bishop Road (Route 84). Thus, easy egress from the spur to the site will be available.

The Trade Area

The trade area tributary to a shopping center is dependent upon the size of its principal traffic generator. In the case of a regional shopping center, the principal tenant is assumed to be a strong department store. The specific trade area for any shopping center is limited by various factors including driving time and accessibility, population distribution, geographical and psychological barriers such as lakes and railroads, and the location of existing competitive facilities. As indicated on the map opposite, four zones have been recognized within the over-all trade area for a regional shopping center at the Nutwood Farms site. This zonal divisi of the trade area reflects variations in the drawing power of a development within its over-all area of influence and the proportionate weight of the factors affecting the shopping center in each zone.

As indicated on the map showing the trade area for a regional shopping center at the subject site, it may be seen that the primary zone extends

approximately seven miles outboard from the site. Secondary Zone A is that portion of the trade area closest to downtown Cleveland; the residents of this zone are also closer to other suburban shopping facilities and have, for the most part, existing shopping habits which will tend to carry them away from the proposed center. Secondary Zone B extends outboard from the site about thirteen miles, while the Tertiary Zone, containing those portions of the trade area most distant from the site, extends outboard some twenty-one miles.

Population

The projected population of the trade area for a regional shopping center at the Nutwood Farms site has as a basis figures compiled by the Cleveland Electric Illuminating Company.

Regional Trade Area - Population

Zone	1962	1965	1970
Primary	55,500	63,100	77,300
Secondary A	65,700	71,600	83,400
Secondary B	99,300	115,200	143,900
Tertiary	55,500	62,800	74,600
Total	276,000	312,700	379,200

From the table above it may be seen that the trade area is anticipated to experience considerable future growth. By 1970, population is expected to increase to 379,200, an anticipated growth of approximately 59% over 1959. It should be noted, however, that while the population of the primary zone is estimated to increase about 62% between 1959 and 1970, it will contain, even by 1970, only 20% of total trade area population.

Income and Expenditures

Income data have been developed for the four zones of the trade area and have been determined as a basis for calculating retail potential. It should be pointed out that the information below pertains to the year 1958 which is, at present, the latest year for which complete data concerning income rise are available.

Average Income Levels - 1958

Zone	Per Family and Unrelated Individual	Per Capita
Primary	$ 8,600	$ 2,615
Secondary A	$ 9,830	$ 2,970
Secondary B	$ 8,300	$ 2,440
Tertiary	$ 7,175	$ 2,315
Total Trade Area	$ 8,465	$ 2,585
Cleveland Metropolitan Area	$ 7,850	$ 2,670

The variations in the relationship of per capita to per family and unrelated individual incomes which can be seen in the table, are due mainly to the fact that some portions of the trade area were found to possess families of a larger size than were others.

The table indicates the per capita incomes in the Primary and Secondary A Zones to be about the same or above the average for the Cleveland metropolitan area, while the average per capita incomes of the Secondary B and Tertiary Zones are somewhat below the metropolitan area average. The lower incomes in these latter two zones may be attributed to the partially-rural nature of these zones.

Based on the income data above and the 1954 Census of Business, a per capita expenditure was estimated for the department store and apparel categories in each zone of the trade area. The resulting department store and apparel store sales potentials are discussed in the following paragraphs.

Sales Potential

The total department store and apparel sales potential represents the sum of all expenditures made by trade area residents in department and apparel stores both within and beyond the trade area now being discussed. This total potential is developed as the result of the multiplication of per capita expenditures by population.

Trade Area - Total Department Store Sales Potential
(000's)

Zone	1962	1965	1970
Primary	$ 8,880	$10,096	$12,368
Secondary A	$11,826	$12,888	$15,012
Secondary B	$13,902	$16,128	$20,146
Tertiary	$ 7,215	$ 8,164	$ 9,698
Total	$41,823	$47,276	$57,224

Trade Area - Total Apparel Store Sales Potential
(000's)

Zone	1962	1965	1970
Primary	$ 4,162	$ 4,732	$ 5,798
Secondary A	$ 5,913	$ 6,444	$ 7,506
Secondary B	$ 7,448	$ 8,640	$10,792
Tertiary	$ 4,162	$ 4,710	$ 5,595
Total	$21,685	$24,526	$29,691

It is recognized that despite new shopping facilities in the above selected categories within the trade area, that a certain percentage of total

department and apparel store sales potential will continue to go to facilities in downtown Cleveland. The portion of the total department and apparel store sales potential which is expended outside the central business district is referred to as the suburban share. A suburban share indicating the amount of these expenditures which could reasonably be obtained by suburban facilities has been estimated for each zone of the trade area and is shown in the table below:

Trade Area Department Store Suburban Share
(000's)

Zone	1962	1965	1970	Suburban Share
Primary	$ 5,772	$ 6,562	$ 8,039	65%
Secondary A	$ 7,096	$ 7,733	$ 9,007	60%
Secondary B	$ 9,731	$11,290	$14,102	70%
Tertiary	$ 5,411	$ 6,123	$ 7,274	75%
Total	$28,010	$31,708	$38,422	

Trade Area Apparel Store Suburban Share
(000's)

Zone	1962	1965	1970	Suburban Share
Primary	$ 2,913	$ 3,312	$ 4,059	70%
Secondary A	$ 3,843	$ 4,189	$ 4,879	65%
Secondary B	$ 5,586	$ 6,430	$ 8,094	75%
Tertiary	$ 3,122	$ 3,533	$ 4,196	75%
Total	$15,464	$17,514	$21,228	

A portion of the suburban retail potential is currently being absorbed and will continue to be absorbed by existing retail facilities both within the somewhat beyond the trade area. This situation is, of course, expected to continue even after development of the proposed shopping center. A field survey of these facilities was recently made in order to determine their characteristics as a basis for estimating the sales volume which they may be able to obtain from within the trade area after the development of the proposed center.

Estimates of the effective sales capacity* have been made, and it is noted that the existing and announced department store facilities would be capable of obtaining over $41,255,000 from within the trade area, while the effective sales capacity of apparel stores is estimated to be over $23,675,000.

* See appendix for definition of terms.

The table and facing map on the following page indicate the location of the major existing competitive facilities which will draw at least a portion of their sales volume from within the trade area.

Deducting the effective competition from the total suburban sales potential results in an unsatisfied potential which can be interpreted as an indication of the need for additional facilities of the selected types within the trade area.

Unsatisfied Department Store Sales Potential
(000's)

Zone	Effective Competition	1962	1965	1970
Primary	$ 7,917	--	--	$ 122
Secondary A	12,779	--	--	--
Secondary B	15,294	--	--	--
Tertiary	5,265	$ 146	$ 853	$2,009
Total	$41,255	$ 146	$ 858	$2,131

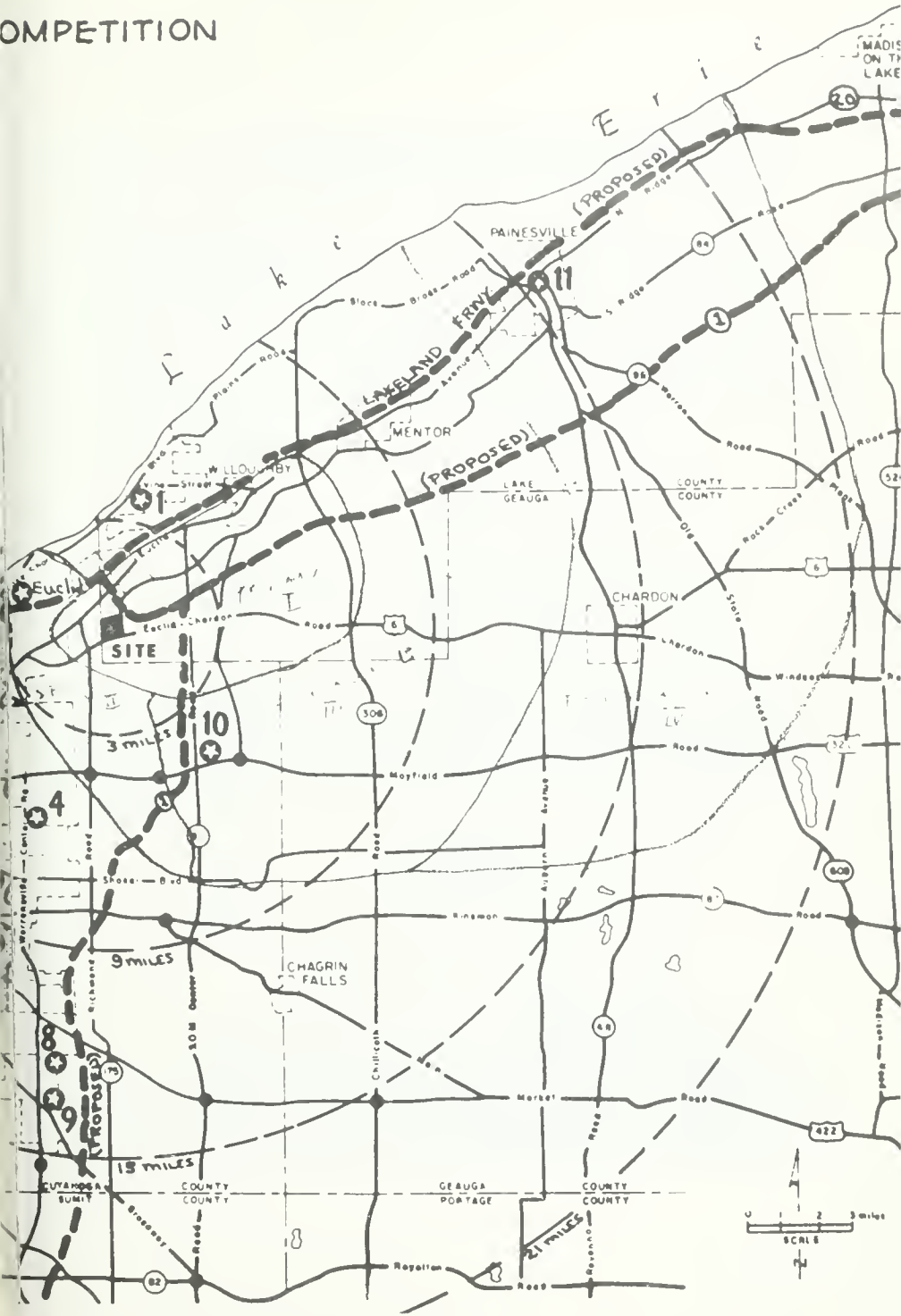
Unsatisfied Apparel Store Sales Potential
(000's)

Zone	Effective Competition	1962	1965	1970
Primary	$ 5,654	--	--	--
Secondary A	7,244	--	--	--
Secondary B	8,375	--	--	--
Tertiary	2,404	$ 718	$ 1,129	$ 1,792
Total	$23,677	$ 718	$ 1,129	$ 1,792

As may be seen in the figures above, the only unsatisfied department store potential prior to 1970 is the far distant tertiary zone. By 1970, only a token market potential appears to exist in the department store category in the primary zone. A nearly similar situation is found in the apparel category, except that even by 1970, only the tertiary zone offers an unsatisfied volume potential. It is at this point that the present discussion with regard to a regional shopping center at the Nutwood Farms site, becomes of a negative nature.

In a positive analysis, any significant unsatisfied sales potential would be further examined and reduced to a level which experience has shown an indi-

OMPETITION


Lake Erie
PAINESVILLE
(PROPOSED)
LAKELAND FRWY
MENTOR
(PROPOSED)
LAKE
GEAUGA
COUNTY
COUNTY
CHARDON
Euclid
SITE
3 miles
10
Mayfield
9 miles
CHAGRIN FALLS
(PROPOSED)
15 miles
CUYAHOGA
SUMMIT
COUNTY
COUNTY
GEAUGA
PORTAGE
COUNTY
COUNTY
21 miles
Royalton
Market
Road
SCALE

EXISTING AND ANNOUNCED DEPARTMENT STORES
IN THE NUTWOOD FARMS AREA*

Map Location	Store	Estimated Size (Square Feet)
1.	Federal (Shoregate)	72,000
	Sears	70,000
2.	Bailey (E. 222nd - Mall Center)	57,400
3.	Higbee (Lakewood)	250,000
	Halle	130,000
4.	May (Cedar Center)	293,400
	Halle	16,500
5.	Bailey (E. 105th)	29,000
	Sears	232,000
6.	Halle (Shaker Square)	32,300
7.	Federal (Lee-Harvard)	103,500
8.	Sears (Southgate)	174,900
	Taylor	59,600
	Penney	64,800
9.	Atlantic Mills (Atlantic Mills)	105,000
10.	Bailey (Eastgate)	75,000
	Penney	19,500
11.	Carlisle-Allen (Parmatown)	43,200
	Sears	33,000
	Gail A. Grant	23,400
		1,254,500

* It is acknowledged that several of the above locations (e.g. # 8 and # 9) are beyond the established trade area for the Nutwood Farms site. However, because of the strength of these distant locations, limited recognition has been given to them in the compilation of effective competition in this discussion.

vidual location could likely obtain. No single store or group of stores can expect to attract the total unsatisfied potential of any given trade area for any considerable lehgth of time.

Share-of-the-Market Approach

In view of the negative implications of the preceding analysis, it was felt that it would be important to check the above findings. This is done through the use of a second method of developing data concerning volume potential available for major retail facilities in the proposed shopping center. This method, which is known as the share-of-the-market method, is based on a more aggressive approach in which it is assumed the department store tenant would be able to compete for a given share of the total suburban market of the trade area, more or less regardless of the extent of other competitive facilities already serving the area.

Department Store Share of the Market
(000's)

Total Suburban Potential			%	Dept. Store Vol. Potential		
1962	1965	1970	Share	1962	1965	1970
$28,010	$31,708	$38,422	5%	$1,401	$1,585	$1,921
--	--	--	10%	2,801	3,171	3,842
--	--	--	15%	4,202	4,756	5,763

It will be noted that in each instance in thie discussion, the mid-point share of the market (10%) was used to indicate estimated department store potential for the Nutwood Farms location. Translation of the above sales volumes available into actual warranted department store area on the basis of stabilized sales levels of $55 to $65 per square foot indicates the following:

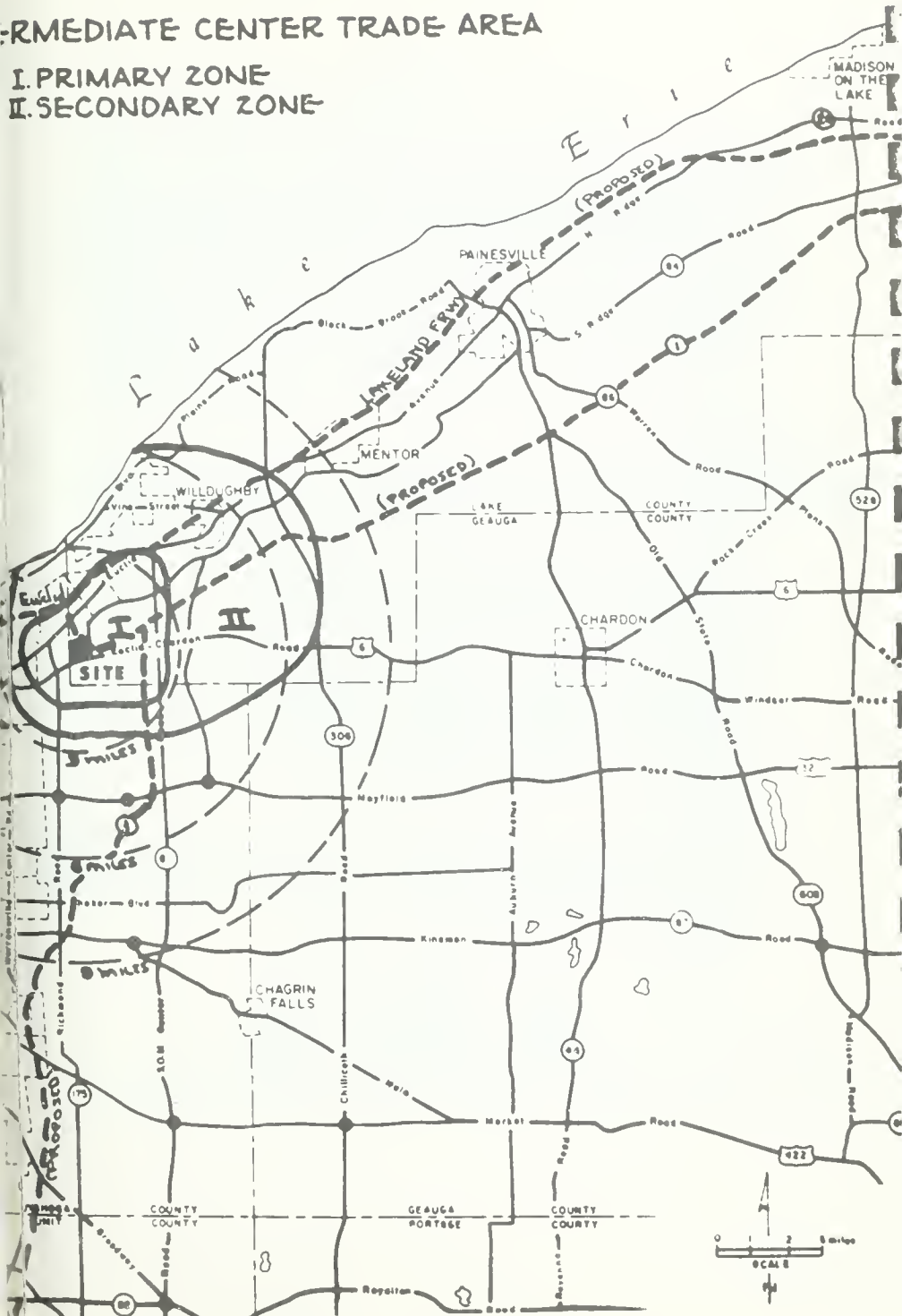
Warranted Store Area
(Sq. Ft.)

Sales Level	1962	1965	1970
$55/Sq. Ft.	51,000	58,000	70,000
$60/Sq. Ft.	47,000	53,000	64,000
$65/Sq. Ft.	43,000	49,000	59,000

It may be concluded from the above that the present market could support only about 50,000 to 60,000 square feet of department store space by 1965, increasing to approximately 70,000 square feet by 1970. The foregoing is based on the assumption that a department store located at the Nutwood Farms site is capable of obtaining a ten per cent share of all department store expenditures made by trade area residents outside the Cleveland central business district.

It has been our opinion throughout this discussion of a regional shopping center that in the face of the strong competition of existing or announced future department store facilities in the Eastern Cleveland suburbs, a warranted department store area of at least 125,000 to 150,000 square feet would be required to attract adequate patronage for the over-all successful operation of a regional shopping center at the Nutwood Farms site.

Thus, as in the case of the residual method employed initially in this analysis, our findings on the basis of a share-of-the-market approach are also negative.


-RMEDIATE CENTER TRADE AREA
I. PRIMARY ZONE
II. SECONDARY ZONE
Lake Erie
MADISON ON THE LAKE
PAINESVILLE
(PROPOSED)
LAKELAND FWY
MENTOR
WILLOUGHBY
SITE
CHARDON
CHAGRIN FALLS
COUNTY
GEAUGA
PORTAGE
Mayfield Road
Kinsman Road
Chardon Windsor Road
Auburn Avenue
Chillicothe Road
Morley Road
Rapolla Road
SCALE

SECTION II

ANALYSIS FOR AN INTERMEDIATE SHOPPING CENTER

The following is an analysis of the opportunities existing at the subject site for a junior department store in the development of an intermediate-size shopping center. An analysis of this type has been undertaken assuming no major tenant is available for the larger regional center. This discussion is based primarily on information derived in previous sections of this report, and the data has been adjusted where necessary to conform with the analytical technique employed in a study of this type of shopping center development. In the analysis it is assumed that such a center would contain at least one strong junior department store as the major tenant, and that the remainder of the project would be merchandised with other comparison and convenience outlets.

Trade Area

The trade area which would be tributary to the major tenant of an intermediate shopping center is shown on the map opposite this page. It may be seen that the primary zone of the trade area is somewhat smaller than that shown for a regional shopping center. This zone of the trade area extends approximately three miles outboard from the site and is limited by distance and driving time. The secondary zone extends approximately seven and one-half miles outboard from the site. The principal difference concerning the market influence which it is thought would be exercised by the intermediate shopping center, as compared to a regional shopping center, is that the intermediate shopping center would not influence the inboard section of the trade area to nearly the degree that a regional shopping center would; of course, the outboard limitations of the intermediate shopping center are much more restrictive than those for the larger regional center.

Population

Because of the different delineation of the trade area from that previously shown, total population would therefore vary to a considerably extent by zone. The following table indicates estimated future population for selected years for the two zones of the trade area for an intermediate shopping center through 1970:

Trade Area Population

Zone	1962	1965	1970
Primary	17,800	20,400	26,000
Secondary	83,100	94,500	113,600
Total	100,900	114,900	139,600

Income and Expenditures

Per capita incomes for the two zones of the trade area have been determined, based on information derived from the 1950 Census of Population. The figures have been adjusted for the under-reporting inherent in the data and for the rise in income since 1950. Per capita incomes for the primary zone of the trade area for an intermediate shopping center at the Nutwood Farms site are approximately $2,795, while per capita incomes in the secondary zone of this trade area are slightly lower, or $2,775.

Based on the income data and on the 1954 Census of Business, a per capita department store expenditure has been estimated for each zone of the trade area.

Total Trade Area Sales Potential

Total department and apparel store sales potential available to a junior department store and apparel store facilities situated at the proposed shopping center is the product of the per capita department store expenditure developed above and the trade area population. The table following summarizes the department store sales potential for the two zones of the trade area for three relevant years:

Trade Area Total Department Store Sales Potential
(000's)

Zone	1962	1965	1970
Primary	$ 2,848	$ 3,264	$ 4,160
Secondary	$12,880	$14,648	$17,608
Total	$15,728	$17,912	$21,768

Trade Area Total Apparel Store Sales Potential
(000's)

Zone	1962	1965	1970
Primary	$ 1,335	$ 1,530	$ 1,950
Secondary	$ 6,232	$ 7,088	$ 8,520
Total	$ 7,567	$ 8,618	$10,470

Since the department and apparel store sales potential is the whole amount spent by trade area residents in department and apparel store facilities, a certain portion of this amount is going and will continue to go to department and apparel stores in downtown Cleveland. A suburban share indicating the

amount of these expenditures which could reasonably be retained by suburban facilities has been estimated for each zone of the trade area and is shown in the table below:

Trade Area Department Store Suburban Share
(000's)

Zone	1962	1965	1970	Suburban Share
Primary	$ 1,851	$ 2,122	$ 2,704	65%
Secondary	8,372	9,521	11,445	65%
Total	$10,223	$11,643	$14,149	

Trade Area Apparel Store Suburban Share
(000's)

Zone	1962	1965	1970	Suburban Share
Primary	$ 934	$ 1,071	$ 1,365	70%
Secondary	$ 4,362	4,962	5,964	70%
Total	$ 5,296	$ 6,033	$ 7,329	

Of the total suburban department and apparel store potential generated by residents in the two zones of the trade area, it is estimated that existing department and apparel stores are effectively competitive to the degree indicated below:

Trade Area Unsatisfied Department Store Potential
(000's)

Zone	Effective Competition	Unsatisfied Potential 1962	1965	1970
Primary	$ 6,685	--	--	--
Secondary	16,571	--	--	--
Total	23,256	--	--	--

Trade Area Unsatisfied Apparel Store Potential
(000's)

Zone	Effective Competition	Unsatisfied Potential 1962	1965	1970
Primary	$ 3,511	--	--	--
Secondary	4,678	--	$ 284	$1,286
Total	$ 8,189	--	$ 284	$1,286

Based on the figures developed above, it would appear that opportunities for the development of an intermediate shopping center with a junior department store as the major tenant, are negative at present. There are some possibilities, however, that population may increase more rapidly than appears likely at the present time. Should unexpectedly rapid expansion occur, it might be necessary to review again the results of the foregoing analysis.

The fact that a larger intermediate center is not felt to be warranted at present does not, however, preclude the use of at least a portion of the property for another type of retail development.

APPENDIX

DEFINITIONS OF TERMS

To further facilitate review and appraisal of this analysis, definitions of some of the phrases and words used which have special significance are set forth below.

Regional Shopping Center - A regional shopping center is generally designed to serve a trade area population of from 150,000 to 400,000 people. The size of this type of center may range from 350,000 square feet to over 1,000,000 square feet. Department stores are the dominant tenants, and normally occupy about one-third to one-half of the total area. The function of such a center is to create complete comparison shopping facilities with a strong attraction for customers living as much as 10 to 15 miles from the site, depending, of course, upon existing competitive facilities, access routes, etc. The area of strongest influence for such a center normally extends from three to six miles from the development.

Dominant Tenant - The dominant tenant -- the department store -- or stores in some cases, is the primary traffic generator which attracts customers to the shopping center. While it is possible for a center to operate without such a tenant, it would be unlikely that leases for all of the essential non-department store space could be obtained in the absence of a major tenant. The realization of a maximum return on the investment requires the presence of this major tenant, and as a result, it is essential that the trade area of the proposed shopping center be capable of supporting the dominant tenant or tenants.

Trade Area - The area of influence from which a shopping center could expect to derive as much as 85% of its total sales volume is defined here as the trade area of the center. This area is delimited by various factors which include driving time; topography; natural and man-made barriers such as coast lines, rivers, swamps, highways and railroad tracks; and the existence of strong competitive facilities.

It should be noted here that the 85% of total sales volume which the shopping center can expect from its trade area is not the suburban share (see definition following) but rather a statistical value used to indicate that some portion of the sales volumes obtained in a suburban shopping center comes from beyond the logical and normal trade area borders. This business nor-

mally consists of transient trade, an occasional shopping trip from a distant city and other like shopping. Throughout this report statistical value has not been given to this trade (up to 15% of total sales volume) but it has been recognized and, as a result, this unevaluated sales volume may be considered as a plus factor which will add to the security of the investment.

Suburban Share - The suburban share of total retail expenditures refers to that portion of those expenditures which would be made in suburban, i.e., non-downtown stores, providing adequate suburban shopping facilities are available. The determination of suburban share depends upon the distance of the area from a major downtown shopping district, the presence of other suburban stores within the area, existing shopping habits, store preference, etc. The suburban share varies greatly depending upon the influence of the above factors. For example, the suburban share of department store-type merchandise expenditures in Manhattan would be nearly 0%, while in suburban Nassau and Suffolk Counties, distance, as well as the existence of suburban retail developments, have combined to result in a suburban share of 80% to 85% for department store-type merchandise.

Total Sales Capacity - Capacity as used throughout this report refers to the estimated amount of sales volume that existing retail facilities are capable of obtaining and holding under normal competitive conditions when adequate facilities with competent management are available to customers. In no way does the use of the term connote maximum physical capacity of a given plant to attain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities when customers are free to choose from a wide variety of stores.

Effectiveness - Effectiveness refers to that portion of the total sales capacity of a competitive unit or group of stores which the unit or group obtains from within the subject trade area. This term refers to the estimated effect which existing competitive facilities will have in the subject trade area after the proposed shopping center is constructed.

Inboard and Outboard Sides - These terms are used to refer to portions of a trade area which lie between the site and the central business district (inboard side) or beyond the site away from this major competitive area (outboard side). Normally, existing shopping habits, other major competitive facilities and the general orientation of population in the inboard side makes a given suburban center less effective per capita in this zone than in the outboard area. This does not mean, however, that a larger portion of the center's sales volume will necessarily originate in the outboard area. Often population is more heavily concentrated on the inboard side, and although the center is less effective per capita in this area, it is still of considerable importance and will draw a large portion of its volume from this part of the trade area.

V. HISTORY OF ATTEMPTS BY HILLTOP TO INTEREST TENANTS, DEVELOPERS AND INVESTORS IN NUTWOOD

On the following pages appears a resume in chart form of the attempts by Hilltop, both on behalf of Mesdames Ashcraft and Powell, and of Ridge Hills, Inc. to interest potential tenants, developers or investors in the potential of Nutwood for development as a shopping center, discount center, or for motel or restaurant purposes. The results were uniformly negative.

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Higbee Co.	Department Store	August 1, 1958	Conference	A.F., R. 1139-40
Sears, Roebuck	Department Store	August 4, 1958	Conference	A.F., R. 1141
Dominic Visconsi	Developer	August 8, 1958	Conference	A.F., R. 1141
Higbee Co.	Department Store	August 26, 1958	Phone call	EX. 371, P. 47
Higbee Co.	Department Store	September 12, 1958	Visit to Site	EX. 371, P. 47
William Taylor & Son	Department Store	November 22, 1958	Letter Enclosing Aerial Photo & Isochron Chart	A.F., R. 1144-46
Fred Stark	Developer	Before Dec. 18, 1958	Conference	EX. 371, P. 65
Halle Bros.	Department Store	Before Dec. 31, 1958	Letter, Promotional Materials	TR. 348
Dominic Visconsi	Developer	January 18, 1959	Conference	EX. 371, P. 73
Fred Stark, Leonard Fuchs	Developers	January 18, 1959	Conference	EX. 371, P. 73
William Ruple	Builder & Developer	During Jan., 1959	Conference	EX. 371, P. 72-74
Edward Mellen	Investment Broker	During Jan., 1959	Conference	EX. 371, P. 72-74

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Higbee Co.	Department Store	During Jan., 1959	Indirect Contact Through Mr. Mellen	A.F., R. 1150
William Taylor & Son	Department Store	During Jan., 1959	Phone Call	EX. 371, P. 73
Sears, Roebuck	Department Store	March 7, 1959	Letter	A.F., R. 1155-57
Edward Mellen, et al.	Investment Brokers	July 10, 1959	Conference	A.F., R. 1184
Allied Stores (Sterling-Linder-Davis)	Department Store	July 15-30, 1959	Letter, Conferences Visit to Site	A.F., R. 1184; TR. 351-52
Harry Ratner	Developer	July 22, 1959	Conference	A.F., R. 1184
Albert Ratner	Developer	July 29, 1959	Conference	A.F., R. 1184
Edward DeBartolo	Developer	Oct.-Dec., 1959	Conferences	TR. 353-61
The May Co.	Department Store	1958 or 1959	Conferences, Visit to Site	TR. 347-48
Unidentified	"Land Users"	January 18-20, 1960		EX. 371, P. 162
Edward DeBartolo	Developer	January 28, 1960	Letter	A.F., R. 1224-25
The May Co.	Department Store	June 29, 1960	Promotional Brochure, Conference	A.F., R. 1245; TR. 421-25
Newberry Co.	Variety Store	September 30, 1960	Promotional Brochure	A.F., R. 1250
Allied Stores	Department Store	September 30, 1960	Promotional Brochure	A.F., R. 1250
W. T. Grant	Department Store	September 30, 1960	Promotional Brochure	A.F., R. 1250
Woolworth	Variety Store	September 30, 1960	Promotional Brochure	A.F., R. 1250
J. C. Penney Co.	Department Store	September 30, 1960	Promotional Brochure	A.F., R. 1250
Higbee Co.	Department Store	Before Oct. 25, 1960	Promotional Brochure	A.F., R. 1251
Sheraton Hotels	Hotels	November 4, 1960	Promotional Brochure	A.F., R. 1252
Hotel Corporation of Americea	Hotels	November 4, 1960	Promotional Brochure	A.F., R. 1252
Hilton Hotels	Hotels	November 4, 1960	Promotional Brochure	A.F., R. 1252

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Howard Johnson	Restaurants	November 4, 1960	Promotional Brochure	A.F., R. 1252
Holiday Inns	Motels	November 4, 1960	Promotional Brochure	A.F., R. 1252
Stouffer Co.	Restaurants	November 4, 1960	Promotional Brochure	A.F., R. 1252
The Kroger Co.	Grocery Stores	November 18, 1960	Promotional Brochure	A.F., R. 1252
Montgomery Ward	Department Stores	May 18, 1961	Promotional Brochure	A.F., R. 1257
Interstate Dept. Stores	Department Stores	June 1, 1961	Promotional Brochure	A.F., R. 1257
The May Company	Department Stores	June 14, 1961	Promotional Brochure	A.F., R. 1257
Homart Corp.	Division of Sears, Roebuck	July 18, 1961	Promotional Brochure	A.F., R. 1258
J. M. Fields	Discount Store	August 3, 1961	Promotional Brochure	A.F., R. 1258
Mason's Discount Centers	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Shopper's Fair Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
E. J. Korvette, Inc.	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Clark's Discount Department Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
King's Dept. Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
R. H. Macy & Co.	Department Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Creamery Package Mfg. Co.	Ice Skating Rinks	September 21, 1961	Schematic Land Use Plan	A.F., R. 1260
Sears, Roebuck	Department Store	September 30, 1961	Promotional Brochure	A.F., R. 1260
Peter Kavanos	Investor	November 16, 1961	Promotional Brochure	A.F., R. 1261
R. H. Macy & Co.	Department Stores	August 3, 1961	Promotional Brochure	A.F., R. 1262
Joseph Stendig	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Fordham Co.	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Crossway Motor Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Interhost	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Manger Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Ramada Inn Roadside Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Imperial "400" Motels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Travelodge Corp.	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Twenty-Five Investors or Developers		1961 or 1962	Promotional Brochure	A.F., R. 1262-63

VI. EXHIBITS

On the following pages are listed the Exhibits which were identified at trial, together with a record of the action taken thereon. Several explanatory notes are in order, to-wit:

1) Exhibits were, by agreement of counsel, numbered sequentially during depositions. Some were not identified at trial, hence there are gaps in the number sequence in the following table.

2) Because of the foregoing agreement as to numbering, exhibits do not bear a "plaintiffs'" or "defendants'" designation.

3) In the table, "R" refers to the record of papers filed, "TR" to the reporter's transcript. The "R" citations under the "Identified" column refer to the pretrial order.

4) The column, "Offered Post-Trial," refers to exhibits which were, pursuant to direction of the court, referred to in post-trial briefs, although not admitted at trial. The page numbers in this column refer to a stipulation and order making such exhibits part of the trial record. There was no further action by the court on these exhibits, hence they are not shown as admitted or rejected.

5) The index to the reporter's transcript does not record the offering of exhibits, as distinct from their identification, admission and rejection, hence it was not feasible to include a column entitled "Offered."

6) At TR 2118, and in the reporter's index to transcript, Exhibit 344 is incorrectly referred to as "ex. 334-E." There is no "ex. 334-E," and from the context it is clear that ex. 344 was the subject of the court's action on TR 2118, hence on the following table ex. 344 is shown as admitted at TR 2118.

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
1	R 1385				
2	R 1385				
3	R 1385				
5	R 1385				
6	R 1385				
7	R 1392	TR 2527			
9	R 1385				
10	R 1385	TR 446			
11	R 1385	TR 447			
12	R 1385				R 2191
13	R 1385			TR 770	
15	R 1385				
16	R 1385	TR 2528			
19	R 1385	TR 655			
20	R 1385				R 2191
21	R 1385	TR 169			
24	R 1385			TR 811	
25	R 1385	TR 700			R 2191
27	R 1385	TR 455			
28	R 1385	TR 457			
29	R 1385	TR 447			
31	R 1385	TR 169			
32	R 1385	TR 169			
33	R 1385				
34	R 1385	TR 2527			
35	R 1385	TR 461	TR 172		
36	R 1385	TR 462			
37	R 1385				
38	R 1388			TR 740	
39	R 1388				
40	R 1388				
41	R 1388	TR 700			
42	R 1388				
43	R 1388	TR 445			
44	R 1386				
45	R 1386				
46	R 1386	TR 2321			
47	R 1386	TR 2321			
48	R 1386	TR 2321			
49	R 1386				
50	R 1386				
51	R 1386				
52	R 1386				
53	R 1386				
54	R 1386	TR 682			
55	R 1386	TR 771		TR 773	
56	R 1386				
58	R 1386				
58 A		TR 2112			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
		TR 2510			
59	R 1386				
60	R 1386				
61	R 1386				R 2191
63	R 1386				R 2191
64	R 1386				
65	R 1386				
66	R 1386				
67	R 1386				
68	R 1386				
69	R 1386				
72	R 1386				R 2191
73	R 1386				
74	R 1386				
75	R 1386				
76	R 1386				
77	R 1386	TR 2530			R 2191
78	R 1386	TR 2527			
79	R 1386				R 2191
80	R 1386				
81	R 1386				R 2191
82	R 1386	TR 651			
83	R 1386				
84	R 1386				R 2191
86	R 1392				
88	R 1386				
91	R 1386				
92	R 1386				
93	R 1386	TR 448			
94	R 1386	TR 1232			
95	R 1386				
96	R 1392				
97	R 1386	TR 2542			R 2191
98	R 1386				
99	R 1386				
99 A	R 1386				
99 B	R 1386				
104	R 1386				R 2191
105	R 1386	TR 2189			
106	R 1386	TR 2542			
107	R 1392				
109	R 1386	TR 2543	TR 2519		R 2191
110	R 1386	TR 2542			
111	R 1386	TR 2542			
112	R 1386				R 2191
117	R 1386	TR 866			R 2191
118	R 1386	TR 1682		TR 1684	R 2191
		TR 2534			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
122	R 1386				
125	R 1386				
130	R 1386				
130-1		TR 978			
133	R 1386				
142	R 1386				R 2192
143	R 1386	TR 597			
147	R 1386	TR 964			
148	R 1386	TR 953			
149	R 1386	TR 959			
150	R 1386	TR 962			
152	R 1386				
153	R 1386				
154	R 1386				R 2192
155	R 1386				R 2192
156	R 1386				
157	R 1386				
158	R 1386				R 2192
159	R 1386				
160	R 1386				
161	R 1386				
162	R 1386				
163	R 1386				
164	R 1386	TR 2534			
166	R 1386				
166 A	R 1386	TR 2535	TR 141		
168	R 1386				R 2192
169	R 1386				
170	R 1386				
171	R 1386				
172	R 1386	TR 2565			
173	R 1387				
174	R 1387				
175	R 1387	TR 447			
176	R 1387	TR 447			
177	R 1387	TR 448			
178	R 1387				
179	R 1387	TR 599			
181	R 1387	TR 779			
182	R 1387	TR 782			
185	R 1387				
186	R 1387	TR 788			
187	R 1392				
188	R 1387				
189	R 1392				
190	R 1392				
191	R 1387	TR 655			
	TR 818	TR 655			
192	R 1387	TR 2542			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
193	R 1387	TR 1005			
194	R 1387	TR 2538			
195	R 1387				
	R 1392				
195 A		TR 112			
195 B		TR 111			
196	R 1392				
197	R 1387				
197 A	TR 149	TR 149			
197 B	TR 284	TR 284			
197 C	TR 285	TR 285			
197 D					R 2192
198	R 1387				
198 A		TR 108			
198 B		TR 110			
198 C	TR 134				
198 D	TR 1638	TR 1640			
199	R 1387				
199 C		TR 2318			
200	R 1387				
200-3		TR 1702			
201	R 1387				
201-1		TR 2517			
201-2		TR 2517			
201-3		TR 2517			
201-4		TR 2517			
201-5		TR 2517			
201-6		TR 2517			
201-7		TR 2517			
201-8		TR 2517			
201-9	TR 311	TR 1465	TR 314		
202	R 1387				
202-1		TR 2539			
202-2		TR 2539			
203	R 1392				
204	R 1387				R 2192
205 A	R 1387	TR 1425			
205 B	R 1387				
206 A	R 1387				
206 B	R 1387				
206 C	R 1392				
206 D	R 1392				
207	R 1392				
208 B	R 1392				R 2192
209 A	R 1387	TR 662			R 2192
		TR 1940			
209 B	R 1387	TR 1940			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
209 C	R 1387	TR 1940			
210	R 1387	TR 718			
210 A	R 1387				
211 A	R 1392	TR 2540			
212 A	R 1392	TR 2540			
213	R 1387				
214	R 1392				
217					R 2192
218	R 1387				
219	R 1387				
220	R 1387				
223	R 1392				
224	R 1387				
225	R 1387	TR 2518			
	R 1392				
231	R 1387				
232	R 1387		TR 2391		
			TR 2541		
233	R 1392				
234	R 1392	TR 2541			
235	R 1392				
236	R 1387	TR 449			R 2192
237	R 1387				
238	R 1387				
239	R 1392	TR 449			
245	R 1392		TR 2555		
246	R 1387			TR 2543	
247 A	R 1392				
248	R 1392				
248 L		TR 1656			
249	R 1387				
250	R 1387				
251	R 1387				
252	R 1392	TR 2549			
253	R 1387	TR 1891			
254	R 1387	TR 747			
255	R 1387				
257	R 1387				
258	R 1387		TR 494		
260	R 1387				R 2192
261	R 1387				
264	R 1387				
265	R 1387				
266	R 1387				
267	R 1387			TR 2545	
268	R 1392				
269	R 1392				
270	R 1392				
271	R 1392	TR 2545			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
272	R 1392	TR 2545			
273	R 1392				
274	R 1387				R 2192
275	R 1387				
276	R 1387	TR 2546			
277	R 1387				
278	R 1392				
279	R 1387				
280	R 1387				
282	R 1387				
291	R 1387				
292	R 1387				
293	R 1387				
296	R 1387				
298	R 1387				
299	R 1387				
300	R 1387				
301	R 1387				
302	R 1387				
311	R 1387				
312	R 1387				R 2192
313					R 2192
314					R 2192
315	R 1387	TR 126			
316	R 1388				
318	R 1388				
319	R 1388				
320	R 1388				
322	R 1388	TR 120			
323	R 1388	TR 2553			
324	R 1388				
325	R 1388				
326	R 1388				
327	R 1388				
328	R 1388	TR 2547			
329	R 1388				
330	R 1388	TR 451			
331	R 1388	TR 451			
332	R 1388	TR 452			
333	R 1388	TR 453			
334	R 1388	TR 453			
334 A		TR 2548			
335	R 1388				
335 A		TR 455			
335 B		TR 455			
336	R 1388	TR 212			
337	R 1392	TR 2549			
338	R 1392	TR 2549			
339	R 1392				

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
340	R 1392	TR 2549			
341	R 1392				
342	R 1392	TR 1714			
343	R 1392	TR 1927			
344	R 1392	TR 2118			
344 A		TR 2119			
344 B		TR 2120			
344 C		TR 2121			
344 D		TR 2121			
344 E		TR 450			
344 F		TR 2122			
345	R 1392	TR 1928			
346	R 1392	TR 1929			
347	R 1392			TR 2212	
348	R 1392				
348 A	TR 398	TR 398			
348 B	TR 401	TR 404			
349	R 1392				
350	R 1392				
351	R 1389			TR 2550	
352	R 1389				
353	R 1389				
354	R 1389	TR 1471			
355	R 1389				
356	R 1389				
357	R 1389				
358	R 1389				
359	R 1389				
361	R 1389				
362	R 1389				
363					R 2192
364	TR 207				
365	TR 1239	TR 2553			
366	TR 2208	TR 2268			
367	TR 2208	TR 2268			
368	TR 2440	TR 2440			
369	TR 2467	TR 2467			
370	TR 2493	TR 2493			
371		TR 2550			